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Who Counts?: The Twelfth Amendment, the Vice President, and the Electoral Count

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WHO COUNTS?:
THE TWELFTH AMENDMENT,
THE VICE PRESIDENT, AND
THE ELECTORAL COUNT

Robert J. Delahunty[†] & *John Yoo*^{††}

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INTRODUCTION

Under the Twelfth Amendment of the United States Constitution, Vice President Kamala Harris will open the presidential electoral votes on January 6, 2025, before both houses of Congress.¹ Would she have the constitutional authority to resolve disputes over the legitimacy of those votes? If so, what types of disputes can she address?

Imagine a controversy where President Joseph Biden runs for reelection in 2024 against Florida governor Ron DeSantis. Biden wins the popular vote but loses in the Electoral College, 278 to 260. Arizona, Georgia, and Pennsylvania, which chose Biden in 2020, cast their forty-six electoral votes for DeSantis.² All three states, with Republican legislatures, enact new voting rules in the wake of complaints by Donald Trump over the 2020 election. Their new voting laws require an identification to vote, prohibit “vote harvesting,” and end universal mail-in ballots. The Supreme Court refuses to accept challenges to these rules for suppressing minority voting in violation of the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965.³ When the electoral votes arrive in Washington, D.C., to be counted in early January, disputes arise over their legitimacy. Assume that a divided Congress does not act on claims that the voting rules in those states undermine the election’s legitimacy. Could Vice President Harris, as

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1. See 3 U.S.C. § 15 (“Congress shall be in session on the sixth day of January succeeding every meeting of the electors.”).
 2. U.S. NAT’L ARCHIVES AND RECS. ADMIN., 2020 ELECTORAL COLLEGE RESULTS (2021), <https://www.archives.gov/electoral-college/2020> [<https://perma.cc/TKL7-QBSN>] [hereinafter NAT’L ARCHIVES, 2020 ELECTORAL COLLEGE RESULTS] (stating the voting record as, Arizona: eleven electoral votes; Georgia: sixteen electoral votes; Pennsylvania: twenty electoral votes; total electoral votes: 538).
 3. Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. § 10301).

President of the Senate,⁴ resolve disputes over the electoral votes from the three states?

We argue that while the constitutional text is ambiguous, its best reading makes the Vice President, as President of the Senate, the only federal institution to judge the legitimacy of electoral votes, subject in limited cases to judicial review. We also conclude, however, that the Vice President can only exercise this power over specific types of disputes originating from the states. Under our theory, if Vice President Harris receives only one set of electoral votes from the state institutions identified under the laws of Arizona, Georgia, and Pennsylvania, she can only accept them as legitimate. She has no authority to decide whether the states' electors were appointed constitutionally, consistent with the Fourteenth and Fifteenth Amendments. But if she were to receive two electoral slates from a single state, one blessed by the legislature and another by the governor, or were to face a dispute between the political branches of a state government and the state or federal court, she would have to choose which electoral votes to count and determine their legitimacy.

Our second argument is that the current system for resolving federal election disputes and determining the meaning of constitutional provisions for counting electoral votes is misguided. This issue has received renewed attention with President Biden's 2020 victory. After a contentious campaign, states reported 306 electoral votes for Biden and 232 for then-incumbent Donald J. Trump.⁵ But rather than concede defeat, Trump contested Biden's victory at every step, from the counting of individual ballots to the selection of state electors and the opening of the electoral votes by Congress.⁶

Trump's resistance failed, along with an attack on the Capitol that interfered with the electoral counting. During the January 6 attack, rioters attempted to prevent the counting. Trump demanded that Vice

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4. We shall employ the terms "Vice President" and "President of the Senate" interchangeably because the Constitution designates the Vice President as President of the Senate.
 5. See NAT'L ARCHIVES, 2020 ELECTORAL COLLEGE RESULTS, *supra* note 2 (stating the voting record as, Biden: 306 electoral votes; Trump: 232 electoral votes).
 6. Dan Mangan & Kevin Breuninger, *Trump Strikes Out in Arizona, Michigan, Pennsylvania Ballot Challenges, Biden's Lead More Secure*, CNBC, <https://www.cnbc.com/2020/11/13/trump-drops-ballot-court-challenge-in-arizona-biden-lead-too-big.html> [https://perma.cc/4CGW-RTNZ] (Nov. 13, 2020, 5:53 PM); Audrey McNamara, *Electoral College Is Last Long-Shot Chance for Trump Allies to Challenge Election Results*, CBS NEWS (Dec. 10, 2020, 6:48 AM), <https://www.cbsnews.com/news/electoral-college-presidential-election-results-trump-challenge/> [https://perma.cc/W99X-NHQQ]; Michael S. Schmidt, *Trump Says Pence Can Overturn His Loss in Congress. That's Not How It Works*, N.Y. TIMES, <https://www.nytimes.com/2021/01/05/us/politics/pence-trump-election.html> [https://perma.cc/L9JB-5UHU] (Apr. 30, 2021).

President Michael R. Pence reject the electoral votes of a sufficient number of states, so that either he could win or the House of Representatives could select the President under the Twelfth Amendment.⁷ Trump argued that the Vice President “can decertify the results or send them back to the states for change and certification.”⁸ “He can also decertify the illegal and corrupt results and send them to the House of Representatives for the one vote for one state tabulation.”⁹ While Pence conceded that he “share[s] the concerns of millions of Americans about the integrity of this election,”¹⁰ he concluded: “I do not believe that the Founders of our country intended to invest the Vice President with unilateral authority to decide which electoral votes should be counted during the Joint Session of Congress.”¹¹ Describing his role as “largely ceremonial,” Pence instead called upon Congress to use the procedures of the Electoral Count Act of 1887 (ECA or the Act),¹² which requires majorities of both houses to discard irregularly cast electoral votes.¹³ Accordingly, Congress heard objections to the legitimacy of electoral votes from Pennsylvania and Arizona and, after suspending its proceedings during the Capitol Hill attack, rejected the challenges.¹⁴

Both Trump and Pence misunderstood the Constitution. Under the best reading of the text, structure, and history, Article II and the Twelfth Amendment establish the basic system for selecting the President and the Vice President. Article II gives each state electoral

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7. Cydney Henderson & Bryan Alexander, *President Trump Supporters Violently Storm Capitol Hill: Here's Everything We Know*, USA TODAY (Jan. 6, 2021, 9:20 PM), <https://www.usatoday.com/story/news/nation/2021/01/06/capitol-hill-riot-heres-everything-we-know/6573033002/> [<https://perma.cc/2UX5-L3C9>] (explaining that the riot on January 6, 2020, caused the joint session to reconvene at a later time to count the votes); Zeke Miller & Jill Colvin, *Trump Insists That Pence Can Decertify Results*, PBS NEWSHOUR (Jan. 5, 2021, 11:47 PM), <https://www.pbs.org/newshour/politics/trump-insists-that-pence-can-decertify-results> [<https://perma.cc/RU7R-6RAR>].
 8. Miller & Colvin, *supra* note 7.
 9. *Id.*
 10. Letter from Michael R. Pence, Vice President of the U.S., to Colleagues (Jan. 6, 2021), <https://int.nyt.com/data/documenttools/pence-letter-on-vp-and-counting-electoral-votes/9d6f117b6b98d66f/full.pdf> [<https://perma.cc/VH8Y-53SG>] (on file with the *New York Times*).
 11. *Id.*
 12. 3 U.S.C. § 15.
 13. Letter from Michael R. Pence to Colleagues, *supra* note 10.
 14. *Shall the Objection Submitted by the Gentleman from Arizona, Mr. Gosar, and the Senator from Texas, Mr. Cruz, and Others Be Sustained?*, ROLL CALL VOTE 117TH CONG. 1 (2021), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1171/vote_117_1_00001.htm [<https://perma.cc/QM5J-3E37>].

votes equal to the combined number of its senators and members of the House. It also grants state legislatures the authority to appoint electors, who must cast separate ballots for both the President and the Vice President. The electors meet in their states and send a certification of their votes to Congress.¹⁵ Under the Twelfth Amendment, “the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.”¹⁶ If no candidate receives a majority, the Constitution defers the final choice to the House, with each state delegation receiving a single vote.¹⁷ The Founders rejected both congressional selection and popular national elections as methods of choosing a President. Instead, they created a state-centric system.

Rather than leave the decision to the Vice President or the states, Congress has claimed the final power to resolve electoral vote disputes. It created the ECA to eliminate uncertainty in electoral vote counting. It created a “safe harbor” date by which states had to determine their electoral votes.¹⁸ It also provided for cases where the validity of an electoral vote was challenged, allowing the majority of both houses to reject electoral votes that are not “regularly given,” effectively overriding the resolution of any disputes by the states.¹⁹ But in the spring of 2022, Congress began considering proposals to amend the Act to prohibit the Vice President from rejecting any electoral votes and limit its own role in deciding electoral disputes.²⁰

Contrary to Congress’s claim of authority, it had not played a significant role in resolving such disputes until 1876. In that election, those bent on ending Reconstruction had terrorized African American voters. The ensuing fights, political and real, led Florida and Louisiana, two former Confederate states, to submit competing slates of electoral votes.²¹ In the 1887 ECA, Congress enacted a number of measures. For

15. U.S. CONST. art. II, § 1 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress The Electors shall meet in their respective States, and vote by Ballot for two Persons And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to . . . the President of the Senate.”).

16. U.S. CONST. amend XII.

17. *Id.*

18. 3 U.S.C. §§ 5, 7; *see infra* notes 137–54 and accompanying text.

19. 3 U.S.C. § 15.

20. *See infra* note 29 and accompanying text.

21. There was also a single disputed elector from Oregon. EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* 117–39 (2016); WILLIAM H. REHNQUIST, *CENTENNIAL*

example, the Act prescribed the “safe harbor” provision noted above.²² With regard to disputed votes, the Act allowed a majority of both houses acting concurrently to reject electoral votes that are not “regularly given,” thus effectively overriding state resolution of any disputes.²³

A few disputes have arisen in the twentieth and twenty-first centuries. In the 1960 and 2000 presidential elections, then-incumbent Vice Presidents Richard M. Nixon and Albert A. Gore did not settle electoral controversies in a way that altered the outcome, though they both lost those elections. More recently, some scholars argued that Congress ought to manage the risk of a major dispute.²⁴ After *Bush v. Gore*,²⁵ scholars debated the constitutionality of the ECA, with some in passing assuming the law was valid.²⁶ In 2004, for example, Bruce Ackerman and David Fontana predicted future trouble because “[t]he constitutional text does not speak clearly” in the case of multiple, disputed electoral votes from the same state.²⁷ In 2019, election law scholar Edward Foley presciently observed that ambiguities in federal law might create a conflict between Vice President Pence and a Democratic Congress over disputed electoral votes that would decide

CRISIS: THE DISPUTED ELECTION OF 1876, at 109–12 (1st ed. 2004);
7 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE
UNITED STATES: FIVE JUSTICES AND THE ELECTORAL COMMISSION OF
1877, at 43 (Supp. 1988).

22. Act of Feb. 3, 1887, ch. 90, 24 Stat. 373 (amended by 3 U.S.C. §§ 5, 7).
23. 3 U.S.C. § 15.
24. See, e.g., Edward B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 LOY. U. CHI. L. REV. 309, 350–51 (2019).
25. 531 U.S. 98 (2000) (per curiam).
26. Compare Chris Land & David Schultz, *On the Unenforceability of the Electoral Count Act*, 13 RUTGERS J.L. & PUB. POL’Y 340, 374–75 (2016) (explaining that the Act is unconstitutional), Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1695 (2002) (same), and John Harrison, *Nobody for President*, 16 J.L. & POL. 699, 705, 707 (2000) (same), with Jesse H. Choper, *Why the Supreme Court Should Not Have Decided the President Election of 2000*, 18 CONST. COMMENT. 335, 343 (2001) (stating the Act may have “constitutional problems”), Dan T. Coenen & Edward J. Larson, *Congressional Power Over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 926 (2002) (supporting the Act as constitutional), and SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000, at 98–106 (rev. ed. 2001) (explaining that the Act’s constitutionality is not fully addressed).
27. Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 552 (2004).

the 2020 election.²⁸ Most recently, Congress in the spring of 2022 began considering proposals to amend the ECA. The goal of these proposals is to prohibit the Vice President from rejecting any electoral votes, no matter the reason, and to limit Congress's participation to certain cases, e.g., ineligible electors.²⁹ On December 29, 2022, President Biden signed an omnibus spending bill that included reforms to the Act.³⁰

As we explain in this Article, neither Trump, Pence, nor Congress had the right answer to the 2020 electoral vote count. We argue that the ECA cannot prevent state legislatures or the Vice President from performing their duties under the Twelfth Amendment. The Constitution's best reading requires that the Vice President, acting as President of the Senate, decide the validity of disputed electoral votes. But the Vice President occupies that place in the electoral system only when the states fail to produce a definitive result. The Vice President cannot reject electoral votes on the grounds that the electors' appointments were invalid, nor can the Vice President remand disputed electoral votes to their respective states. On the facts of the 2020 election, no dispute over the electoral votes justified Vice President Pence's intervention. States had certified their electoral counts, and no courts had halted the meeting of the electors or the reporting of their votes.³¹

28. Foley, *supra* note 24, at 321–23.

29. The 2020 election events led to a call to reform the ECA. Claudia Grisales, *House Panel Issues First Proposed Reforms to Electoral Count Act After Jan. 6 Attack*, WHRO PUB. MEDIA (Jan. 14, 2022) <https://whro.org/news/national-news/25720-house-panel-issues-first-proposed-reforms-to-electoral-count-act-after-jan-6-attack> [<https://perma.cc/FWR7-U8SW>]. A staff report on reforming the statute was issued. ZOE LOFGREN, COMM. ON HOUSE ADMIN. CHAIRPERSON, 117TH CONG., REP. ON THE ELECTORAL COUNT ACT OF 1887: PROPOSALS FOR REFORM 24 (House Staff Rep. 2022), https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/Electoral%20Count%20Act%20Staff%20Report_.pdf [<https://perma.cc/8FHC-9A8X>] [hereinafter HOUSE STAFF REPORT]. Senators Klobuchar, King, and Durbin released a discussion draft of a proposed bill. Electoral Count Modernization Act, 117th Cong. (2022) (discussion draft), <https://www.king.senate.gov/imo/media/doc/ecmaonepager.pdf> [<https://perma.cc/8GC9-9A5N>].

30. Alex Gangitano, *Biden Signs \$1.7 Trillion Government Funding Package*, THE HILL (Dec. 29, 2022), <https://thehill.com/homenews/administration/3792314-biden-signs-1-7-trillion-government-funding-package/> [<https://perma.cc/F674-8CAW>]; see also Electoral Count Reform and Presidential Transition Improvement Act of 2022, Pub. L. No. 117-328 (2022), <https://www.congress.gov/117/bills/hr2617/BILLS-117hr2617enr.pdf> [<https://perma.cc/8XWF-YFNS>].

31. Liz Stark & Ethan Cohen, *All 50 States and DC Have Now Certified Their Presidential Election Results*, CNN, <https://www.cnn.com/2020/12/09/politics/2020-election-results-certified/index.html> [<https://perma.cc/2Z95-8SCU>] (Dec. 9, 2020, 9:28 PM); Russell Wheeler, *Trump's Judicial Campaign to Upend the 2020 Election: A Failure, but Not a Wipe-Out*, BROOKINGS

Because the Twelfth Amendment requires that “the votes *shall* then be counted,”³² Pence was obliged to count the votes as submitted by the states.

Other types of electoral disputes, however, could require the Vice President to act. For example, a state could submit competing slates of electors. Or the legitimacy of a state’s electors could be undermined because its government failed to reach a definite conclusion. In such cases, a federal institution must choose and uphold certain electoral votes. Our theory leads to the conclusion that the best reading of the constitutional text, structure, and history assigns that role to the Vice President, not Congress or the judiciary.

This Article will proceed as follows. Part I begins by describing the facts that led to the January 6 controversy. It will set out the relevant constitutional text and statutory law and will describe the effort to interrupt the electoral counting. Part I will also summarize the views of leading scholars on the resolution of electoral disputes. Part II presents our argument based on the constitutional text, structure, and history. We bring to light analogous constitutional mechanisms that scholars and government officials have overlooked. We also discuss previously unexamined Revolutionary War-era state constitutional procedures for resolving disputes over the selection of the executive. Part III examines electoral practices since the Constitution’s ratification. Part IV anticipates and responds to criticisms of these conclusions.

This Article concludes that Congress has unconstitutionally arrogated to itself the authority to challenge and resolve the legitimacy of electoral votes. Other than witnessing the opening and counting of those votes, Congress has no substantive role in the process. Only if the electoral count fails to yield a majority can Congress step in, and even then, only the House can choose the President by state delegation. The Constitution’s text and structure vest the power to decide electoral vote questions in the Vice President. This power in turn requires that a state government fail to speak unanimously on electoral matters, such as when two competing bodies of a state government certify different slates of electors.

On January 6, 2021, no state witnessed an internal conflict over the casting of its electoral votes. This mooted any alleged dispute over the election’s outcome. Thus, the Vice President had no role to play in that election, aside from the purely ministerial task of opening the electoral ballots. We will conclude by analyzing what Vice President Pence should (not) have said during the January electoral vote count.

INST. (Nov. 30, 2021), <https://www.brookings.edu/blog/fixgov/2021/11/30/trumps-judicial-campaign-to-upend-the-2020-election-a-failure-but-not-a-wipe-out/> [<https://perma.cc/E43L-24DH>].

32. U.S. CONST. amend. XII (emphasis added).

I. THE LAW OF PRESIDENTIAL ELECTIONS AND
THE JANUARY 6, 2021, ATTACK ON THE CAPITOL

The events that led to the attack on the Capitol on January 6, 2021, occurred at the last step of the constitutional method for selecting Presidents. While most presidential elections call upon the federal government to perform primarily ministerial duties, a few races have revealed ambiguities in the process. Lacunae in the constitutional text can become significant in closely contested elections that involve doubt over the legitimacy of the state selection of electors. These textual ambiguities do not come into play when the electoral vote and the popular vote together produce a clear outcome, nor should they matter if the states have properly followed their own laws for the selection of electors. But the Constitution's silence could raise difficulties in resolving an election where a state fails to operate its elections in a manner consistent with state or federal law and cannot resolve disputes over the legitimacy of electors. This Part will describe the 2020 election, the workings of the Electoral College, and the gaps left in situations of close, disputed elections.

A. The Events of January 6, 2021

On January 6, 2021, Vice President Pence presided over a joint meeting of Congress to open and count the electoral votes for President. In most election years, this date passes without much public notice. News channels usually report the winner of the presidential contest on the night of the election. The verdict of the Electoral College lends only a formal legality to a result known and accepted two months before.

But as in so many other ways, 2020 was different. The 2020 electoral count was already destined to become the most controversial since at least 1876, when disputes over votes in several southern states led to the creation of a special electoral commission that effectively decided the presidential election.³³ The count of the electoral votes not only extended into the wee hours of January 7, 2021, but a mob had broken into the Capitol on January 6 and violently interrupted the process. Only after police cleared the Capitol and restored order could the count finally continue.³⁴ At the end of the process, Congress rejected

33. REHNQUIST, *supra* note 21, at 113–200 (recounting the creation of the special electoral commission and its role in the election).

34. Kat Lonsdorf, Courtney Dorning, Amy Isackson, Mary Louise Kelly & Alisa Chang, *A Timeline of How the Jan. 6 Attack Unfolded—Including Who Said What and When*, NPR (June 9, 2022, 9:11 AM) <https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when> [https://perma.cc/9BV8-ARPB].

challenges to the validity of electoral votes from Pennsylvania and Arizona and declared Joseph Biden the winner.³⁵

Several factors made the 2020 election far different than normal contests. First, the Constitution's use of presidential electors, who are allocated based on the combined total of a state's senators and members of the House, made the election closer than a simple plebiscite would have mandated.³⁶ Biden won a majority of the 158 million votes cast nationwide and 306 electoral votes to 232 for President Trump—virtually the same margin of Trump's victory in the electoral vote four years before (304–227).³⁷ Biden won the election by flipping the critical battleground states—Michigan (16 electoral votes), Wisconsin (10), Pennsylvania (20), Georgia (16), and Arizona (11)—that had made Trump's victory possible in 2016.³⁸ But if Trump had won 21,000 more votes in Wisconsin, 11,000 more in Arizona, and 12,000 more in Georgia, he would have come within a single electoral vote of prevailing.³⁹ Nevada, which Trump lost by only 34,000 votes, could have provided that margin.⁴⁰ With that switch of 78,000 votes across four states, Trump could have won the 2020 election as he had won the 2016 election: by prevailing in the Electoral College even while losing the popular vote.

But a narrow margin alone does not explain the challenge to the 2020 election. Four years earlier, Democratic candidate Hillary Clinton lost by almost the same margins in the same states in 2016 as Trump did in 2020. Not only did she win the popular vote by about 3 million,

35. David Aaro, *Senate Rejects Pennsylvania's Election Result Challenge*, FOX NEWS (Jan. 6, 2021, 11:25 PM), <https://www.foxnews.com/politics/house-votes-to-accept-arizonas-slate-of-electoral-votes> [<https://perma.cc/85P6-35JC>].

36. U.S. CONST. art. II, § 1, cl 2.

37. FEC, OFFICIAL 2020 PRESIDENTIAL GENERAL ELECTION RESULTS (2021); NAT'L ARCHIVES, 2020 ELECTORAL COLLEGE RESULTS, *supra* note 2; NAT'L ARCHIVES, 2016 ELECTORAL COLLEGE RESULTS (Jan. 11, 2021), <https://www.archives.gov/electoral-college/2016> [<https://perma.cc/BT6Z-B2AW>].

38. *Compare* NAT'L ARCHIVES, 2020 ELECTORAL COLLEGE RESULTS, *supra* note 2, *with* NAT'L ARCHIVES, 2016 ELECTORAL COLLEGE RESULTS, *supra* note 37.

39. Michael Andre, Aliza Aufrichtig, Gray Beltran, Matthew Bloch, Larry Buchanan, Andrew Chavez, Nate Cohn, Matthew Conlen, Annie Daniel, Asmaa Elkeurti, Andrew Fischer, Josh Holder, Will Houp, Jonathan Huang, Josh Katz, Aaron Krolik, Jasmine C. Lee, Rebecca Lieberman, Ilana Marcus, Jaymin Patel, Charlie Smart, Ben Smithgall, Umi Syam, Rumsey Taylor, Miles Watkins & Isaac White, *Presidential Election Results: Biden Wins*, N.Y. TIMES, (Jan. 7, 2021), <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-president.html> [<https://perma.cc/VP8Y-F3YV>] (approximate amount of votes required).

40. *Id.* (approximate amount of votes required).

but she lost three battleground states by margins that were very close: Michigan by 10,704; Pennsylvania by 44,292; and Wisconsin by 22,748.⁴¹ If those 77,744 votes had switched—all less than 1 percent of the vote in those states—Clinton would have won the 2016 election.⁴² Clinton did not herself raise any formal legal challenge to the outcome.

More than just a close election spurred the unprecedented events of 2021. Responses to the COVID-19 pandemic presented a second factor. In response to the spread of the disease, most states imposed various forms of lockdowns on economic and social activity.⁴³ Many states also introduced widescale changes to their electoral systems.⁴⁴ Several states relaxed in-person voting requirements, such as by allowing the use of absentee ballots without requiring an excuse, or by expanding the period within which election authorities would accept ballots.⁴⁵ Before the pandemic, for example, Pennsylvania had required voters who wished to vote by mail to show a medical reason or out-of-town travel.⁴⁶ Pennsylvania's legislature amended Pennsylvania law in 2019 to extend the ballot receipt deadline and allow any resident to vote by mail without the need for an excuse. However, when the pandemic broke out in early 2020, the legislature refused to extend the deadline further. In response, the Supreme Court of Pennsylvania overrode the state legislature's voting deadlines, allowed the counting of ballots three days after election day, and altered the standard for mailed ballots.⁴⁷ This led the Republican Party and President Trump to allege that states where governors, election boards, or courts had altered voting procedures contrary to existing statutory law or without

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41. *2016 Presidential Election Results*, N.Y. TIMES (Aug. 9, 2017, 9:00 AM), <https://www.nytimes.com/elections/2016/results/president> [<https://perma.cc/GH8X-Z4W7>].
 42. *Id.*
 43. John Yoo, *Emergency Powers During a Viral Pandemic*, 15 N.Y.U. J.L. & LIBERTY 822, 824, 841 (2022).
 44. For a list of these changes, see *Changes to Election Dates, Procedures, and Administration in Response to the Coronavirus (COVID-19) Pandemic, 2020*, BALLOTPEDIA (Nov. 19, 2020), [https://ballotpedia.org/Changes_to_election_dates,_procedures,_and_administration_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020](https://ballotpedia.org/Changes_to_election_dates,_procedures,_and_administration_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020) [<https://perma.cc/SL7V-9SPP>].
 45. See, e.g., *Moore v. Circosta*, 141 S. Ct. 46, 46–47 (2020).
 46. 25 PA. CONS. STAT. § 3302 (2002); see also Katy Kline, *PA Rejected Twice as Many Absentee Ballots in 2018*, KEYSTONE CROSSROADS (Mar. 18, 2019), <https://www.wskg.org/pa-rejected-twice-as-many-absentee-ballots-in-2018/> [<https://perma.cc/9CZL-TBFS>] (explaining the absentee voting laws in Pennsylvania as of 2019 and the history thereof).
 47. *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 732–33 (2021).

legislative approval had violated the Constitution. The U.S. Supreme Court, however, declined to review these claims.⁴⁸

The third, and most decisive, factor was Donald Trump. No sitting President running for reelection had ever before attacked the legitimacy of electoral votes and suggested suspending their count. Past Vice Presidents who were running for the Presidency had resisted calls to use their status as President of the Senate to reject electoral votes.⁴⁹ Richard Nixon in 1961 and Al Gore in 2001, for example, presided over the counting of the electoral votes in close elections that gave the victory to their opponents.⁵⁰

To be sure, accusations of stolen elections by defeated presidential candidates are nothing new in American politics. Andrew Jackson, for example, claimed that his loss in the 1824 election had resulted from a “corrupt bargain” between John Quincy Adams and Henry Clay when the election went to the House under the Twelfth Amendment.⁵¹ Democratic presidential nominee John Kerry did not challenge his defeat in 2004 at the time, but in 2008 he alleged that Ohio Republican officials had committed improprieties in that election.⁵² Hillary Clinton suggested that Donald Trump was an “illegitimate president” who had “stolen” the 2016 election.⁵³ Accusations that Trump had colluded with Russia to alter the 2016 outcome, which may have originated in the Clinton campaign, triggered a criminal investigation by special counsel Robert Mueller.⁵⁴

48. Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 2 (2020).

49. See *infra* notes 494–502 and accompanying text.

50. See *infra* notes 494–501 and accompanying text.

51. JOHN YOO, CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH 145–46 (2010) [hereinafter YOO, CRISIS AND COMMAND].

52. Matthew Jaffe & Tim Skoczek, *John Kerry: It Was Right for Me to Concede Quickly in 2004*, CNN (Oct. 27, 2016, 6:01 AM), <https://www.cnn.com/2016/10/27/politics/john-kerry-axe-files/index.html> [https://perma.cc/F5CF-35ND]; Associated Press, *Kerry Revives 2004 Election Allegations*, NBC NEWS (Aug. 29, 2008, 5:10 PM), <https://www.nbcnews.com/id/wbna14573946> [https://perma.cc/TH2F-ZM66]; see also David Remnick, *Negotiating the Whirlwind*, NEW YORKER (Dec. 14, 2015), <https://www.newyorker.com/magazine/2015/12/21/negotiating-the-whirlwind> [https://perma.cc/9W2Q-GURJ].

53. Colby Itkowitz, *Hillary Clinton: Trump Is an ‘Illegitimate President,’* WASH. POST (Sept. 26, 2019, 5:03 PM), https://www.washingtonpost.com/politics/hillary-clinton-trump-is-an-illegitimate-president/2019/09/26/29195d5a-e099-11e9-b199-f638bf2c340f_story.html [https://perma.cc/X337-ADKA].

54. Marshal Cohen, *FEC Fines Hillary Clinton Campaign and DNC Over Trump-Russia Dossier Research*, CNN (Mar. 30, 2022) <https://www.cnn.com/2022/03/30/politics/clinton-dnc-steele-dossier-fusion-gps/index.html>

Yet Trump's attack on the credibility of the 2020 election broke past precedents. Even before the election took place, the incumbent had criticized the widespread adoption of absentee voting. In the first presidential debate in September 2020, Trump said that the increase in mail-in voting was "swamping" state officials and would lead to widescale fraud.⁵⁵ He claimed that the unsolicited mailing of ballots amounted to "fraud" and that rules for counting ballots that arrived after election day revealed a "rigged" system.⁵⁶ Trump's attacks on the electoral system grew worse after the states reported their results. In a December 2, 2020, speech, Trump alleged that the election system "is now under coordinated assault and siege" and that there was evidence of "shocking irregularities, abuses and fraud" in a "corrupt mail-in balloting scheme" put into place by Democrats in swing states.⁵⁷ His campaign filed lawsuits in the federal courts to stop swing states from certifying their electoral votes.⁵⁸ These suits relied upon unfounded claims, such as Sidney Powell's allegation that outside forces had hacked into voting machines, and produced bizarre scenes, such as Rudolph Giuliani's press conference in front of the Four Seasons landscaping company in Philadelphia.⁵⁹ These lawsuits culminated in the Supreme Court's rejection of Texas's challenges to the electoral vote in Pennsylvania, Wisconsin, Michigan, and Georgia on December 11,

[<https://perma.cc/CU64-SV52>]; U.S. Dep't of Just., Report on the Investigation into Russian Interference in the 2016 Presidential Election (Mar. 2019).

55. MaryAlice Parks & Kendall Karson, *A Step-by-Step Look at Trump's Falsehoods on Mail-in Voting: Analysis*, ABC NEWS (Oct. 1, 2020, 5:01 AM), <https://abcnews.go.com/Politics/step-step-trumps-falsehoods-mail-voting-analysis/story?id=73354979> [<https://perma.cc/6ZDU-67UZ>].
56. *Id.*
57. The White House, *President Trump Statement on 2020 Election Results*, C-SPAN (Dec. 2, 2020), <https://www.c-span.org/video/?506975-1/president-trump-statement-2020-election-results> [<https://perma.cc/3BY3-4UVD>].
58. *See, e.g.*, Trump v. Kemp, 511 F. Supp. 3d 1325, 1330 (N.D. Ga. 2021); Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899, 906 (M.D. Pa. 2020), *aff'd sub nom.* Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 F. App'x 377 (3d Cir. 2020), and *appeal dismissed sub nom.* Signed v. PA, No. 20-3384, 2021 WL 807531 (3d Cir. Jan. 7, 2021).
59. Josh Wingrove, *Giuliani Drops Sidney Powell as Trump 'Strike Force' Splits*, BLOOMBERG (Nov. 22, 2020, 8:14 PM), <https://www.bloomberg.com/news/articles/2020-11-23/giuliani-drops-sidney-powell-as-trump-s-strike-force-splinters> [<https://perma.cc/U83C-VGS4>]; Miles Bryan, *From Obscure to Sold Out: The Story of Four Seasons Total Landscaping in Just 4 Days*, NPR (Nov. 11, 2020, 5:04 AM), <https://www.npr.org/2020/11/11/933635970/from-obscure-to-sold-out-the-story-of-four-seasons-total-landscaping-in-just-4-d> [<https://perma.cc/HCV4-QWZA>].

2020.⁶⁰ Attorney General William Barr declared that the Justice Department had not found any voting fraud “on a scale that could have effected a different outcome in the election.”⁶¹

President Trump continued to question the legitimacy of the election results even as Congress neared the time for the counting of the electoral votes. While investigations continue into the exact events of January 6, 2021, it is incontrovertible that Trump gave a speech claiming widespread voter fraud before a large crowd. “I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard,” the President declared.⁶² “[I]f you don’t fight like hell, you’re not going to have a country anymore.”⁶³ A mob descended on the Capitol and forced a suspension of the electoral vote count. Members of Congress fled into hiding; rioters and Capitol police engaged in pitched battles throughout the House and Senate; and five died, including one protester shot by police and one police officer.⁶⁴ After the police restored order, Congress returned in the early morning hours of January 7, 2021, to reject challenges to the legitimacy of electoral votes and recognized Biden as the winner.⁶⁵ Trump’s involvement in the events of the January 6 attack on the Capitol led to his second impeachment by the House of Representatives, though the Senate again acquitted him.⁶⁶

After the impeachment, media and congressional investigations revealed that President Trump had attempted to pressure Vice

60. Texas v. Pennsylvania, 141 S. Ct. 1230, 1230 (2020).

61. Katie Brenner & Michael S. Schmidt, *Barr Acknowledges Justice Dept. Has Found No Widespread Voter Fraud*, N.Y. TIMES (Dec. 1, 2020), <https://www.nytimes.com/2020/12/01/us/politics/william-barr-voter-fraud.html> [https://perma.cc/CXL3-NHYE].

62. Brian Naylor, *Read Trump’s Jan. 6 Speech, A Key Part of Impeachment Trial*, NPR (Feb. 10, 2021, 2:43 PM), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial> [https://perma.cc/WLH2-Z5CK].

63. *Id.*

64. Lonsdorf et al., *supra* note 34; Chris Cameron, *These Are the People Who Died in Connection with the Capitol Riot*, N.Y. TIMES (Jan. 5, 2022), <https://www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html> [https://perma.cc/78N9-AR8D]. While the police officer died from multiple strokes that occurred “hours after [his] confrontation with the mob,” the medical examiner indicated that these strokes were related to the events of January 6. Cameron, *supra*. Two crowd members died of natural causes, one died of an overdose, and one died when she was shot by a Capitol Police officer. *Id.*

65. Lonsdorf et al., *supra* note 34.

66. Domenico Montanaro, *Senate Acquits Trump in Impeachment Trial—Again*, NPR (Feb. 13, 2021, 3:52 PM), <https://www.npr.org/sections/trump-impeachment-trial-live-updates/2021/02/13/967098840/senate-acquits-trump-in-impeachment-trial-again> [https://perma.cc/8AHP-TKBZ].

President Pence to reject the electoral votes of several states and ask their legislatures to reconsider.⁶⁷ John Eastman, at that time a law professor (and former Dean) at Chapman Law School, in his capacity as a legal advisor to the Trump campaign, produced two memoranda setting out a theory to justify this unprecedented course of action.⁶⁸ Eastman reportedly provided the first, two-page memorandum on January 2, 2021 to Senator Mike Lee of Utah and perhaps others.⁶⁹ He then introduced a longer version on January 4, 2021, at a meeting between President Trump, Vice President Pence, and their staff.⁷⁰ At that meeting, Trump and Eastman failed to persuade Pence that he could “pause the process in Congress so Republicans in state legislatures could try to hold special sessions and consider sending another slate of electors.”⁷¹ While investigators are still determining the details of these meetings, Eastman has said publicly that he wrote the memoranda, which apparently formed the basis of his legal advice to President Trump and the reelection campaign.⁷² Eastman has said that the January 2 memo constituted a “preliminary version” of the January 4 memo, and that they were laying out different constitutional options to challenge the electoral count.⁷³

Regardless of the precise timing and audience of the memos, they present a consistent theory about the resolution of disputes over the electoral count. First, Eastman maintains that seven states had sent “dual slates of electors”—Georgia, Pennsylvania, Wisconsin, Michigan, Arizona, Nevada, and New Mexico—which amounted to eighty-four

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67. *See Here's Every Word of the Third Jan. 6 Committee Hearing on Its Investigation*, NPR, (June 16, 2022, 8:25 PM) (providing the transcript from the June 13 hearing of the House select committee investigating the January 6th Capitol Attack), <https://www.npr.org/2022/06/16/1105683634/transcript-jan-6-committee> [<https://perma.cc/TRR5-Y8ZE>].
68. John Eastman has since retired from Chapman and is now the Director of the Center for Constitutional Jurisprudence at the Claremont Institute. *John C. Eastman*, CLAREMONT INST., <https://www.claremont.org/scholar-bio/john-c-eastman/> [<https://perma.cc/VUP2-BGLB>] (last visited Sept. 26, 2022); *see* BOB WOODWARD & ROBERT COSTA, PERIL 209–12, 226 (2021).
69. WOODWARD & COSTA, *supra* note 68, at 209.
70. *Id.* at 224–26.
71. *Id.* at 226.
72. *See* John McCormack, *John Eastman vs. the Eastman Memo*, NAT'L REV. (Oct. 22, 2021, 6:30 AM), <https://www.nationalreview.com/2021/10/john-eastman-vs-the-eastman-memo/> [<https://perma.cc/24PF-VARU>].
73. *See* Joseph M. Bessette, *A Critique of the Eastman Memos*, CLAREMONT REV. BOOKS, Fall 2021, at 16, 17.

electoral votes.⁷⁴ According to the memo, Trump electors met on December 14, cast their electoral votes, and transmitted the votes to Washington, D.C.⁷⁵ Second, Eastman states that “there is very solid legal authority, and historical precedent, for the view that the President of the Senate does the counting, including the resolution of disputed electoral votes.”⁷⁶ If, as the longer memo states, “all the Members of Congress can do is watch,” then any law that seeks to regulate any challenges to the votes, such as the ECA, “is likely unconstitutional.”⁷⁷ The Vice President, Eastman concludes, is “the ultimate arbiter.”⁷⁸

Based on this constitutional analysis, Eastman reviewed several options to block Joseph Biden’s certification as President on January 6, 2021. First, if Pence found that any of the legislatures of the seven states had certified Trump instead of Biden as the winner, and those states added up to thirty-eight electoral votes, the memo declares that “**TRUMP WINS.**”⁷⁹ Second, if the legislatures in the seven states had not certified Trump, Pence could decide to reject those states’ electoral votes “based on all the evidence and the letters from state legislators calling into question the executive certification” of the electoral votes from their states.⁸⁰ Eastman argued that this would give Trump a majority of all of the electors “appointed,” rather than the overall majority of the possible electors, and thus “**TRUMP WINS.**”⁸¹ Third, Pence could find that the seven states had appointed multiple slates of electors, that neither candidate had a majority of the 538 possible electoral votes, and therefore, under the Twelfth Amendment, the selection of President would shift to the House.⁸² Eastman observed that if the House were to choose the President by delegation, “the vote

74. Copy of Jan. 2nd Memo, *Privileged and Confidential, January 6 Scenario*, <https://cdn.cnn.com/cnn/2021/images/09/20/eastman.memo.pdf> [<https://perma.cc/M8Z8-FY3A>] (last visited Sept. 23, 2022); Copy of Jan. 3rd Memo, *Privileged and Confidential, January 6 Scenario*, <https://cdn.cnn.com/cnn/2021/images/09/21/privileged.and.confidential.--jan.3.memo.on.jan.6.scenario.pdf> [<https://perma.cc/PYV7-GPJS>] (last visited Sept. 23, 2022) [hereinafter Jan. 3rd Memo]; NAT’L ARCHIVES, 2020 ELECTORAL COLLEGE RESULTS, *supra* note 2.

75. Jan. 3rd Memo, *supra* note 74.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* Eastman here claims that Professor Laurence Tribe agrees with his view. *Id.*

82. *Id.*

there is 26 states for Trump, 23 for Biden, and 1 split vote. **TRUMP WINS.**⁸³

As a last option to stop Biden's certification as winner of the electoral vote, Eastman proposed something truly unprecedented. He argued that because "the ongoing election challenges must conclude before ballots can be counted," Pence should adjourn the joint session of Congress in disregard of the dates set in the ECA.⁸⁴ This delay would have allowed state legislatures to investigate the November 4 election, and, if they found "sufficient fraud and illegality to affect the results of the election," reject the existing Biden electors and replace them with an alternative slate of Trump electors.⁸⁵ While Eastman conceded that these options were "**BOLD, Certainly**," he justified them on the ground that "this Election was Stolen by a strategic Democrat plan to systematically flout existing election laws for partisan advantage."⁸⁶ Eastman claimed that changing the outcome of the 2020 election itself was less important than resolving a greater "constitutional crisis."⁸⁷ "If the illegality and fraud that demonstrably occurred here is allowed to stand," Eastman concluded, "then the sovereign people no longer control the direction of their government, and we will have ceased to be a self-governing people. The stakes could not be higher."⁸⁸

The Trump campaign's efforts failed. State and federal courts rejected challenges to the legitimacy of the electoral votes in several states.⁸⁹ No state legislatures revoked their laws granting the choice of electors to a popular vote, no state officials offered conflicting slates of electors, and the governors of every state certified the electoral votes.⁹⁰ When January 6 arrived, sufficient members of the House and Senate challenged the electors in Arizona and Pennsylvania to force a debate and vote over their counting pursuant to the ECA, but majorities of both houses rejected the motion on January 7.⁹¹ Vice President Pence

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *See generally* Wheeler, *supra* note 31.

90. *See, e.g.*, Proclamation from Douglas A. Ducey, Governor of Arizona, for the Certificate of Ascertainment for Presidential Electors (Jan. 6, 2021) (on file with Nat'l Archives), <https://www.archives.gov/files/ascertainment-arizona.pdf> [<https://perma.cc/3RBP-7X4T>]. *See generally* NAT'L ARCHIVES, 2020 ELECTORAL COLLEGE RESULTS, *supra* note 2.

91. The challenge to the Arizona electoral votes failed 93–6 in the Senate and 303–121 in the House. The challenge to Pennsylvania's electoral votes failed 92–7 in the Senate and 282–138 in the House. 167 CONG. REC. H93, H112, S31–32, S38 (daily ed. Jan. 6, 2021).

did not overrule or delay the counting of any state's electoral votes. But the mob that attacked the Capitol on January 6 forced a suspension of the count of electors for about six hours, and Vice President Pence did not certify Biden the winner until after 3:00 a.m. on January 7, 2021.⁹²

Trump's effort to reverse the results of the 2020 election had two components: a factual and a legal claim. Factually, the Trump campaign asserted that the electoral votes in seven states had fallen into dispute. It claimed that the meeting of Trump electors in these states met the minimum required to cause the votes of the official electors to fall into doubt. Legally, the Trump campaign asserted that the ECA likely violated the Constitution, and that Vice President Pence had the sole authority to decide whether electoral votes were illegitimate. The campaign further concluded that the Vice President could choose between competing slates or suspend the vote count before the joint session of Congress to allow states to reconsider their choice of electors.⁹³

Unprecedented as these events were, 2020 was not the first presidential election to witness a dispute over the electoral votes. The Constitution's provisions for the selection of presidential electors create some ambiguity, particularly in close elections. In the next Subpart, we identify and describe four different kinds of challenges that could arise in a presidential election.

B. Disputes over Electoral Votes

A dispute over the electoral count can emerge in several ways. We count at least four categories.

First, a losing candidate might challenge the constitutionality of the manner in which a state legislature chose its electors, the legality or constitutionality of an elector's qualifications, or how the elector had voted. Second, different branches of the state government might send competing slates of electors to the Capitol. Third, a losing candidate might argue that the executive or legislative branches of a state government—or even an element of the federal government—had intervened improperly in the manner for choosing the electors. Fourth, a state might fail to reach a definitive count of the popular vote, which could lead different branches of the state government to select electors themselves to meet federal deadlines. Let us explain more fully.

In the first way, a dispute might arise over whether a purported elector was qualified or selected in accordance with constitutional law

92. Lonsdorf et al., *supra* note 34.

93. *READ: Trump's Lawyer's Full Memo on Plan for Pence to Overturn the Election*, CNN (Sept. 21, 2021, 5:47 PM), <https://www.cnn.com/2021/09/21/politics/read-eastman-full-memo-pence-overturn-election/index.html> [<https://perma.cc/7KLL-T3WY>] (citing Memorandum from John Eastman (2021)); Jan. 3rd Memo, *supra* note 74.

or had cast his or her vote in a constitutionally impermissible manner. The legislature could explicitly violate the constitutional process for selecting electors, such as by designating members of Congress or other federal officials as electors, in defiance of Article II's ban on such appointments.⁹⁴ Or a state might violate other provisions of the Constitution in choosing electors, such as by excluding electors because of their race or religion. Or a state might delegate the choice of electors to the popular vote, but then discriminate amongst its citizens based on race, gender, age, or religion in violation of the First, Fourteenth, Fifteenth, Nineteenth or Twenty-Sixth Amendments.⁹⁵ Or a state legislature could limit the choice of electors only to those who promise to vote in a manner that violates the Constitution, for example, by deciding that it will only choose electors who promise to vote for a presidential candidate of a certain religion, in violation of the Religion Clause of the First Amendment or (perhaps) Article VI's ban on religious tests for office. Disputes in the first category have been rare, but they have happened.⁹⁶

While not as likely to occur as the problems we have just identified, similar difficulties could arise in other situations. A state could make a mistake in the transmission of its electoral votes, such as a failure by the electors to sign, certify, or seal their votes as required by the

94. *See, e.g., In re Corliss*, 11 R.I. 638, 640 (1876) (holding that putative elector was disqualified for holding an office of profit or trust under the United States).

95. The systematic exclusion of African Americans from the franchise in the southern states before the enactment of the 1965 Voting Rights Act would qualify as such a violation. *Section 2 of the Voting Rights Act*, U.S. DEP'T JUST., <https://www.justice.gov/crt/section-2-voting-rights-act> [<https://perma.cc/LVX7-TD8B>] (Nov. 8, 2021).

96. For example, in 1876, objections were made to John Watts, a Republican elector from Oregon, who was challenged on the grounds of constitutional ineligibility. At the time of the election, Watts had held an office of profit or trust in the federal government, which is disqualifying under Article II, Section 1, Clause 2. Deeming Watts disqualified, the governor of Oregon, a Democrat, had certified a Democrat in his place. However, Watts had resigned from his office before the Oregon presidential electors met to cast their votes, and the two other Oregon electors, both Republicans, accepted him as qualified, as did the state Attorney General. The challenge to Watts's vote was rejected by the commission that Congress had appointed to recommend resolution of electoral disputes. FAIRMAN *supra* note 21, at 43, 45, 117, 121. In 1872, the Democratic candidate for President, Horace Greeley, died after losing the election but before the electors met to vote. Three Georgia electors for Greeley nonetheless voted for him. Congress refused to count those votes on the grounds that they had not been cast for a "person," as required by the Twelfth Amendment. Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 706, 730–31 (1996).

Twelfth Amendment.⁹⁷ A state could miss the dates for meeting and sending its votes to Washington, D.C., in violation of the deadlines set out by Congress under Article II.⁹⁸ A state could make an error by allowing its electors to vote for a constitutionally ineligible candidate. Suppose, for example, that the electors from Georgia choose candidates for both President and Vice President who were from Georgia.⁹⁹ Or suppose electors voted for a candidate who is not “a natural born Citizen,” or is younger than thirty-five years old, or has not lived at least fourteen years in the United States.¹⁰⁰ These electoral votes would violate the Constitution, but some person or institution would have to possess the authority to make that finding and enforce it.

Second, historical challenges to electoral votes have identified another category of dispute over electoral votes. Suppose that disagreement within a state leads to the certification of two slates of electors that send competing votes to Washington, D.C. This might happen because different factions within a state legislature, or different branches of a state government, disagreed over the election and chose their own electors.¹⁰¹ One political party, for example, might control the state legislature and, dissatisfied with the results of the popular election, seek to reclaim the power to choose the electors. The state executive branch, on the other hand, might accept the results of the

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97. U.S. CONST. amend. XII (“The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate.”).
98. U.S. CONST. art. II, § 1, cl. 4 (“The Congress may determine the Time of [choosing] the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”).
99. This situation would not be permitted under the Twelfth Amendment. U.S. CONST. amend. XII (“The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves.”).
100. U.S. CONST. art. II, § 1, cl. 5 (“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.”).
101. The Framers were not unaware of the potential “difficulty of the federal government’s having to determine which of two contending factions within a state should be considered to be its legitimate government.” MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 163–64 (2016).

popular election and support the original slate of electors. In the election of 1876, for example, the Democratic candidate Samuel Tilden appeared to have won the popular vote in Florida by a margin of about eighty votes. But a state canvassing board, with a 2–1 Republican majority, rejected enough votes as “irregular, false, or fraudulent” so that the Republican candidate, Rutherford Hayes, won by forty-five votes.¹⁰² The Republican slate of electors met and voted for Hayes, and the Republican governor certified that Hayes had won Florida. Nevertheless, the Democratic electors met and sent their votes for Tilden to Washington, and the Democratic Attorney General certified that Tilden had won Florida.¹⁰³ In such a situation, two conflicting slates of electors would require some person or body in the federal government to decide the legitimacy of multiple electoral votes.

Third, the 2020 election raised yet another type of challenge to the validity of an electoral vote. A state executive body or a state or federal court might attempt to alter the manner in which the state legislature chooses to select electors. During the 2020 election, for example, courts sought to change the deadlines for the receipt or counting of absentee ballots.¹⁰⁴ The U.S. Supreme Court chose to defer to state courts (but not to lower federal courts) that altered election deadlines and procedures originally set by the state legislatures.¹⁰⁵ In December 2020, Texas directly asked the Court to stop Georgia, Michigan, Pennsylvania, and Wisconsin from certifying their electoral votes on the ground that they “suffered from significant and unconstitutional irregularities” because branches of the government other than the legislature had changed voting procedures in those states.¹⁰⁶ In *Texas v. Pennsylvania*,¹⁰⁷ however, the Court dismissed the case from its original jurisdiction because Texas lacked standing to challenge other states’ electoral processes.¹⁰⁸

While the Court in *Texas v. Pennsylvania* did not reach the merits, several Justices suggested in their review of lower federal court decisions in 2020 that state governments could not change voting procedures

102. REHNQUIST, *supra* note 21, at 104–05.

103. *Id.* at 105.

104. *See, e.g.*, Pa. Democratic Party v. Boockvar, 238 A.3d 345, 371–72 (Pa. 2020), *cert. denied sub nom.* Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732 (2021).

105. *See, e.g., id.*; Republican Nat’l Comm. v. Democratic Nat’l Comm., 140 S. Ct. 1205, 1207 (2020).

106. Motion for Leave to File Bill of Compl., *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (No. 155).

107. 141 S. Ct. 1230 (2020).

108. *Id.* at 1230.

without the consent of the legislature.¹⁰⁹ In Pennsylvania, for example, the state legislature responded to the COVID-19 pandemic by allowing every voter to cast a ballot by mail, but required that the ballots be received by 8:00 p.m. on election day.¹¹⁰ The Pennsylvania Supreme Court altered the rule to allow ballots received up to three days after the election, so long as they were postmarked on or before election day.¹¹¹ Ballots with illegible or no postmark were also to be considered timely if received by this deadline.¹¹² In other states, some changes to election procedures arose from actions by the state executive branch or by consent decrees.¹¹³

If Article II directly grants the power to select electors solely to the state legislature, neither state courts nor executive agencies have unilateral authority to alter state statutory election law regulating the methods for choosing presidential electors. The opinions of individual Justices on this question merit brief consideration.

Justice Alito identified the issue clearly in his statement in *Republican Party of Pennsylvania v. Boockvar*¹¹⁴:

109. See, e.g., *Republican Nat'l Comm.*, 140 S. Ct. at 1207 (“And all of that further underscores the wisdom of the *Purcell* principle, which seeks to avoid this kind of judicially created confusion.”).

110. Pennsylvania Election Code—Omnibus Amendments, P.L. 552, No.77, §§ 1302-D(a), 1306-D(c) (2019); 25 PA. STAT. AND CONS. §§ 3146.6(c), 3150.16(c) (West 2020) (declared invalid by *Miglioni v. Cohen*, 36 F.4th 153, 155 (3d. Cir. 2022)).

111. Pa. Democratic Party v. Boockvar, 238 A.3d 345, 386 (Pa. 2020), *cert. denied*, *sub nom.* Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732 (2021).

112. *Id.*

113. See Matt Vasilogambros & Lindsey Van Ness, *States Expanded Voting Access for the Pandemic. The Changes Might Stick.*, PEW CHARITABLE TR. (Nov. 6, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/11/06/states-expanded-voting-access-for-the-pandemic-the-changes-might-stick> [<https://perma.cc/BV6E-JSD9>] (“In Kentucky, for example, Democratic Governor Andy Beshear, Republican Secretary of State Michael Adams, and the nonpartisan State Board of Elections came to an agreement earlier this year to eliminate the excuse requirement for mail-in ballots and expand in-person early voting. . . . Similarly, secretaries of state from both parties in Ohio and Michigan took unilateral action to help make the voting process easier during this election, but those policies may only be temporary.”). And in a decision strongly criticized by President Trump, the Georgia secretary of state entered into a consent decree that altered matching signature requirements for mail-in ballots. Darragh Roche, *Trump Rails Against Georgia Gov. Kemp for Consent Decree Aimed at Helping Minority Voters*, NEWSWEEK, <https://www.newsweek.com/trump-georgia-gov-kemp-consent-decree-1547476> [<https://perma.cc/8TQT-PSDW>] (Nov. 14, 2020, 1:37 PM).

114. 141 S. Ct. 1 (2020).

The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election.¹¹⁵

Although the U.S. Supreme Court refused to grant a stay or expedite in *Boockvar*, the Court divided 4–4 in an earlier motion for a stay of the Pennsylvania Supreme Court’s order.¹¹⁶ As Justice Alito wrote in his statement accompanying the Court’s refusal to expedite consideration of a grant of writ of certiorari, “[t]he Supreme Court of Pennsylvania has issued a decree that squarely alters an important statutory provision enacted by the Pennsylvania Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office.”¹¹⁷ Justice Alito, joined by Justices Thomas and Gorsuch, further observed: “That question has national importance, and there is a strong likelihood that the State Supreme Court decision violates the Federal Constitution.”¹¹⁸

Although the Court chose not to intervene when state courts altered their own states’ election laws, it exercised more demanding scrutiny when federal judges attempted to do the same. For example, on April 6, 2020, the Court upheld a decision overturning a federal district judge’s effort to enjoin the Wisconsin legislature’s election laws due to COVID-19.¹¹⁹ The only difference between the Court’s decisions in Wisconsin and Pennsylvania is that the former arose in federal court and raised questions of federal law, while the latter arose in state court and, allegedly, only involved a question of state law. The Court stated that it should not involve itself in cases where state courts purport to change state election law, even to the point of changing the election deadlines chosen by the state legislature, but that it has the authority to do so if the cases arise in federal court.¹²⁰

Finally, a fourth type of dispute might arise over the counting of the popular vote in the states. A state could prove unable to come to a definite final tally due to chaotic conditions. In 2020, the COVID-19 lockdowns, unprecedented volume of mail ballots, and potential

115. *Id.* at 2.

116. *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 643, 643 (2020) (statement by Justice Alito).

117. *Republican Party of Pa.*, 141 S. Ct. 1, 1 (2020).

118. *Id.* at 2.

119. *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1206 (2020) (per curiam).

120. *Id.* at 1207 (per curiam).

confusion among election officials and even voters could have interfered with the operation of some states' electoral systems under the pre-pandemic rules. States may have to engage in recounts when disputes arise over the standards used to judge the legitimacy of different ballots. Election officials might adopt different standards for evaluating ballots. Because states have delegated vote counting to the county level, different local officials may allow votes under standards not used elsewhere in the state.¹²¹ Some city and county officials might even adopt an intent-of-the-voter standard instead of conditions—secured envelopes, signatures, and postmark dates—required by state law.¹²² One or both candidates or their parties might accordingly file lawsuits under *Bush v. Gore*, which requires that states apply uniform standards to judging the legality of an individual vote.¹²³ Litigation in both state and federal courts could threaten to prevent states from coming to a final count in time for federal deadlines.

If a state's vote count becomes tied up in litigation, a state might approach the date for the meeting of electors—in 2020, that was December 14—without having finally selected its electors.¹²⁴ A dispute over electors could erupt at this point. A state legislature might seek to reclaim its authority under Article II of the U.S. Constitution to appoint electors. It could argue that when the popular vote has failed to select a candidate, it must intervene so that the state can perform its constitutional duty to select electors. A legislature might further argue that it can exclude the governor from this function because the Constitution has specifically called upon the state legislatures to perform “electoral”—as distinct from their more common “lawmaking”—functions.

Let us consider how the arguments for and against the resumption of a legislature's appointive power might play out. In various places, the Constitution singles out state “Legislatures”—as distinct from the states or their governments—in allocating responsibilities and powers. Before the adoption of the Seventeenth Amendment, the Constitution directed that “the Legislature” of the states choose U.S. senators.¹²⁵ Article V requires approval of constitutional amendments by “the

121. *16A103—Ballot Counting Standards*, AM. BAR ASS'N, [https://www.americanbar.org/groups/public_interest/election_law/policy/16a103/\[https://perma.cc/FW3P-HFW6\]](https://www.americanbar.org/groups/public_interest/election_law/policy/16a103/[https://perma.cc/FW3P-HFW6]) (July 23, 2021).

122. U.S. CONST. art. I, § 4, cl. 1.

123. *Bush v. Gore*, 531 U.S. 98, 532 (2000) (per curiam).

124. *See* 3 U.S.C. § 7 (noting that “[t]he electors for President and Vice President of each state shall meet and give their votes on the first Monday after the second Wednesday in December”). In 2020, the first Monday after the second Wednesday in December was December 14, 2022.

125. *See* U.S. CONST. art. I, § 3, cl. 1; *Smiley v. Holm*, 285 U.S. 355, 365 (1932).

Legislatures of three fourths of the several states.”¹²⁶ A state constitution no doubt can include or exclude different elements of the state government in the process of making various decisions under state law. But it cannot redefine the meaning of a state legislature for purposes of federal law. We would argue, for example, that state governors cannot veto a state legislature’s ratification of a constitutional amendment, even if governors had that power in the regular process for the enactment of state statutes.¹²⁷ Similarly, Article I’s vesting of the authority to choose presidential electors in the state legislatures not only empowers the legislative branch, but also precludes a state’s executive and judicial branches from altering the legislature’s enactments.

As the Supreme Court has never decided this question, a failure to count the popular vote accurately could open a battlefield. Should the state legislature unilaterally choose the electors, a governor could plausibly demand the right to participate. A governor could argue that if the legislature transferred that right to popular election via statute, it must reclaim it using the same method. Because state constitutions grant executives the right to veto bills, governors might assert the power to veto any legislative effort to choose electors. Ordinarily, if a state legislature has enacted legislation (with the governor’s approval or by overriding the governor’s veto), then the legislature can only rescind that legislation by following the same lawmaking process.¹²⁸ On the other hand, the Court’s language in *Bush v. Gore*, while by no means unambiguous, suggests that the constitutionally “plenary” power of the state legislature over the appointment of electors enables it, “if it so chooses, [to] select the electors itself.”¹²⁹ And Chief Justice Rehnquist, joined by Justices Scalia and Thomas, wrote in a concurring opinion that Article II, Section 1 was an instance in which “the

126. U.S. CONST. art. V.

127. *See Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798) (noting the President has no formal role in the Article V process for amending the Constitution).

128. However, it is not always true that the power to unbind can only be exercised in the same way as the power to bind. While the concurrence of the Senate is needed to make a treaty, its concurrence is not required to rescind a treaty. An Act of Congress adopted under Article I may be superseded by a treaty ratified under Article II, or the latter may be superseded as domestic law by a supervening Act of Congress. *See* John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851 (2001). And while the President may only appoint principal executive officers with the Senate’s advice and consent, he may remove them without the Senate’s approval. *See, e.g., Seila Law L.L.C. v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2188 (2020).

129. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) (citing *McPherson v. Blacker*, 146 U.S. 1, 35 (1892)).

Constitution impose[d] a duty or confer[red] a power *on a particular branch* of a State's government."¹³⁰

The governor, however, might make a second argument to participate in the selection of electors. Under section 6 of the federal ECA, the governor has the duty “as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate” the names of the electors and the method of their appointment.¹³¹ Suppose that the vote count in Pennsylvania appeared to favor Joe Biden, but no official tally had occurred because of litigation in federal or state courts. The governor might claim the right to certify a slate of electors in favor of Biden as the December 8 safe harbor date and the December 14 meeting of the Electoral College approached.¹³² He might argue that he must act to ensure that Pennsylvania sends at least some electoral votes to Washington, D.C., on December 14 in compliance with federal law. Whether this argument is sound has not been tested.

In sum, each of the four categories of electoral disputes that we have identified requires a dispute resolution process, perhaps at the federal level. But which federal actor has the constitutional authority to act here? We turn to that next.

C. Congressional Power and the Electoral Count Act of 1887

The text of the Twelfth Amendment does not clearly establish a mechanism for resolving questions about the legitimacy of electoral votes. Instead, it states that “the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.”¹³³ The text makes clear that the Vice President opens the electoral certificates, but then describes their counting in the passive voice. The question is whether that passive voice allows disputes over the validity of electoral ballots to be resolved by Congress through previous legislation, by the special meeting of both houses, or by the Vice President alone. Congress has claimed the power through its passage of the ECA.

We believe that the most natural reading of the Twelfth Amendment, consistent with practice at the time of its ratification, gives the Vice President the duty to resolve at least some disputes over the legitimacy of electoral votes. We fully acknowledge, however, that our reading is not free from doubt. The amendment's text is highly

130. *Id.* at 534 (Rehnquist, C.J., concurring) (emphasis added).

131. 3 U.S.C. § 6.

132. *Id.* § 5.

133. U.S. CONST. amend. XII.

indeterminate¹³⁴—a fact that has long troubled both political figures and legal scholars.¹³⁵ There are at least three ways to read its language. First, the Vice President’s role in opening the electoral votes may carry forward to their counting. Who else would count the votes if not the presiding officer? And to know which votes to count, the Vice President must first determine which votes are legitimate.¹³⁶

134. See Matthew A. Seligman, *The Vice-President’s Non-Existent Unilateral Power to Reject Electoral Votes* 12 (Jan. 6, 2022) (unpublished article) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3939020 [<https://perma.cc/TY8M-JH5N>]) (“The text isn’t as clear about who counts the electoral votes. . . . [T]hat leaves unanswered the question of who has the authority to count (and to resolve disputes about counting).”).

135. *Bush v. Gore*, 531 U.S. 98, 153 (2000) (Breyer, J., dissenting) (per curiam) (“[T]he Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes.”). A simple reading of the text of the amendment refutes Justice Breyer’s assertion: the text leaves open the question of who does the counting. See Kesavan, *supra* note 26, at 1703 (“The counting function is . . . noticeably ambiguous The counting function may be read as one vested in the President of the Senate, or jointly in the Senate and House of Representatives.”); see also Gary C. Leedes, *The Presidential Election Case: Remembering Safe Harbor Day*, 35 U. RICH. L. REV. 237, 249–50 (2001) (critique of Breyer). This indeterminacy has long been recognized. It was, for example, a fulcrum of debate in the disputed presidential election of 1876. See MICHAEL J. HOLT, *BY ONE VOTE: THE DISPUTED PRESIDENTIAL ELECTION OF 1876*, at 206–09 (2008).

136. See Seligman, *supra* note 134. While acknowledging the indeterminacy of the text, Seligman attributes significance to the switch from the active voice (“the President of the Senate shall . . . open all the certificates”) to the passive voice (“and the votes shall then be counted”). He contends that the switch from active to passive “indicates that the person or entity counting the votes is *different* than the person opening the certificates—and so, it isn’t the President of the Senate who counts.” *Id.* at 13–14 (italic emphasis in the original).

We doubt that the switch to the passive voice *excludes* the President of the Senate from the counting function. Seligman uses a mundane example to make his point, so we shall use a mundane example too. Suppose I know that you are going to open an envelope addressed to you that includes a certain amount of cash, and that you and I might disagree about how much cash is inside once it is opened. If I say to you, “open the envelope and the cash will be counted,” that does not exclude you from doing the counting (while I watch), though it might be taken to mean that we do the counting jointly. Seligman also appears to believe that the text’s failure to identify the President of the Senate as the person doing the counting (while requiring him or her to open the certificates) suggests that *Congress* is to do the counting. *Id.* at 13. But the opposite inference is at least as plausible: the text’s express reference to the President of the Senate and its failure to specify any role for Congress (other than to be “present”) suggests to us that *the President of the Senate* is to perform the counting function as well as that of opening the

Alternatively, the Twelfth Amendment might mean that the Vice President makes an initial determination of the validity of an electoral vote, subject to the agreement of Congress. That interpretation immediately gives rise to a further question: how would the assembled houses of Congress express their disagreement with the Vice President's initial ruling? Congress might resolve disputes by a simple majority of the members present (with each senator and representative having a single vote), by concurring votes of both houses, by votes of the House or Senate alone, or perhaps by the House alone voting by state delegation. Under this approach, either the Vice President or Congress would effectively hold a veto over the decision, with the default rule being either to assume an electoral vote's legitimacy or to hold it in doubt.

On yet a third view, the Vice President may play only a ministerial role by opening the electoral votes, with any disputes left solely to Congress to resolve by legislation. In 1887, Congress opted for the third view and accorded itself the maximum power. In the ECA, Congress assumed the authority to resolve disputes on its own¹³⁷ and severely limited the role of the Vice President.¹³⁸ Adopted in the aftermath of the bitterly disputed 1876 election, the ECA is notorious for interpretative difficulties.¹³⁹ Recently, critics called for its update,¹⁴⁰ and in December 2022, Congress amended the Act as part of an omnibus

certificates while the assembled members of Congress look on. In other words, so far as the text speaks to any *agent* (as opposed to *spectators*) in this process, it identifies only the President of the Senate as an agent. Finally, Seligman claims that none of the proponents of attributing the counting function to the President of the Senate has “ever offered any explanation at all—much less a plausible explanation—for why the drafters of Article II and the Twelfth Amendment would have adopted such a strange sentence structure if what they meant was simply that the President of the Senate does both the opening and the counting.” *Id.* at 14. But there is an obvious *riposte*: if by using the passive voice the Framers meant to indicate a constitutionally significant hiatus between opening the certificates, which the President of the Senate alone was to do, and the counting of the votes, which the joint session alone was to do, then why does the text not say “and then Congress shall count the votes” instead of saying merely that Congress was to be “present”?

137. 3 U.S.C. §§ 5–6, 15–18.

138. See HOUSE STAFF REPORT, *supra* note 29, at 15–17.

139. See, e.g., L. Kinvin Wroth, *Election Contests and the Electoral Vote*, 65 DICK. L. REV. 321 (1960); Kesavan, *supra* note 26; Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541 (2004); Edward B. Foley, *supra* note 24.

140. Matt Shuham, *Time to Update 130-Year-Old Law Trump Tried to Use for 2020 Theft, Nervous Observers Say*, MSN (Nov. 4, 2021), <https://www.msn.com/en-us/news/politics/time-to-update-130-year-old-law-trump-tried-to-use-for-2020-theft-nervous-observers-say/ar-AAQjLSK> [https://perma.cc/J2QW-EBUY]; see also HOUSE STAFF REPORT, *supra* note 29.

spending bill, but without addressing the constitutional problems with the Act.¹⁴¹ As we will explain, the ECA's core provisions do not rest on firm constitutional ground. Nonetheless, they provide the usual procedural framework for the counting of electoral votes. The outline of that framework is as follows.

Under the ECA, Congress looks primarily to the states to resolve electoral vote disputes. Section 5 of the Act creates a safe harbor deadline, which fell on December 8, 2020, for the last election.¹⁴² As Chief Justice Rehnquist explained in *Bush v. Gore*, "Section 5 provides that the State's selection of electors 'shall be conclusive, and shall govern in the counting of the electoral votes' if the electors are chosen under laws enacted prior to election day, and if the selection process is completed six days prior to the meeting of the Electoral College."¹⁴³ If the states can complete a valid count of the popular vote by the safe harbor deadline, the ECA requires Congress to treat the electoral votes as conclusive.¹⁴⁴ If there is a dispute, and state law provides a mechanism to resolve it, and that mechanism produces an answer by the deadline, the ECA requires Congress to treat that outcome as conclusive.¹⁴⁵ A state still may miss the safe harbor deadline because of an uncertain count, litigation, or political conflict.

The ECA establishes the next critical date (December 14, 2020, for the last election) for the meeting of electors in their states.¹⁴⁶ At some point before that date, section 6 of the ECA calls upon the governor to certify the electors "as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment."¹⁴⁷ The governor's section 6 certification can become critically important in a dispute. If a state sends more than one slate of electors (as in the hypothetical of a state legislature reclaiming its authority to select the electors), section 15 of the ECA blesses the slate certified by the governor—unless both houses of Congress agree to reject it. If the House and Senate cannot agree, the ECA effectively gives the governor of a state the power to resolve disputes over electoral votes.¹⁴⁸

141. See *supra* note 30 and accompanying text.

142. CONG. RSCH. SERV., *The Electoral College: A 2020 Presidential Election Timeline* (Oct. 22, 2020), <https://crsreports.congress.gov/product/pdf/IF/IF11641> [<https://perma.cc/AK55-CUEP>] [hereinafter *The Electoral College: A 2020 Presidential Election Timeline*].

143. *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring) (per curiam) (quoting 3 U.S.C. § 5).

144. 3 U.S.C. § 15.

145. *Id.*

146. *The Electoral College: A 2020 Presidential Election Timeline*, *supra* note 142.

147. 3 U.S.C. § 6.

148. *Id.* § 15.

Section 15 of the ECA then creates a system for raising and resolving disputes over electoral votes.¹⁴⁹ The ECA calls for the House and Senate to appoint “tellers” who will tabulate the electoral votes as they are opened by the Vice President.¹⁵⁰ As she opens and reads the certificates, the Vice President “shall call for objections.”¹⁵¹ Section 15 requires that any objection receive, in writing, the approval of at least one member of the Senate and one of the House. If the electoral votes from a state “have been regularly given” by electors certified by the governor, the ECA declares that they cannot be rejected.¹⁵² The ECA, however, does not define “regularly given.” If there are multiple votes from a state, or if the votes are otherwise not “regularly given,” the ECA allows Congress to review their validity.¹⁵³ After an objection, section 15 requires the House and Senate to separate, meet, and vote whether to reject an electoral vote. Only if both houses concur can an electoral vote be rejected. But the ECA makes clear that Congress has assumed the power to resolve disputes over the validity of electoral votes and even to reject them.¹⁵⁴

Does the silence or ambiguity of the Twelfth Amendment create a space for Congress to resolve electoral vote disputes—as it has sought to do in the ECA? That question has attracted the attention of legal scholars. We now turn to their views.

D. Scholarly Commentary

A small but growing number of legal scholars have worried for decades about the consequences of constitutional silence for a disputed presidential electoral count. Attention first focused on the question after the 2000 Florida recount that led to *Bush v. Gore*. The January 6, 2021, attack has produced shorter works so far, but longer analyses no doubt will appear soon. Some have argued that congressional efforts to establish a process for reviewing electoral votes might violate the Constitution, while others maintain that the Constitution permits Congress to legislate in that way. Here, we summarize the leading points of view.

In the wake of the Florida 2000 controversy, Vasan Kesavan published what remains the most thorough examination of the ECA and the Twelfth Amendment.¹⁵⁵ Kesavan concluded that the ECA violates the Constitution for several reasons. First, the constitutional

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. Kesavan, *supra* note 26, at 1653.

text and structure, best read, deprive the Vice President of any role beyond simply opening the electoral certificates. The Constitution's use of the passive voice—"and the votes shall then be counted"—implies that rather than just observing, members of Congress would take on the role of judging the validity of electoral votes.¹⁵⁶ Kesavan believes, however, that the Twelfth Amendment creates a unique constitutional body—the joint session of the House and Senate that counts the votes—over which the Constitution does not grant Congress an enumerated power of regulation.¹⁵⁷ He observes that other provisions of the Constitution describing Congress's power to regulate the times, places, and manner of elections and the House's power to judge the elections of its members stand in sharp contrast to Article II and the Twelfth Amendment's silence regarding the role of Congress—which reinforces the conclusion that Congress has no constitutional power to interfere with the electoral count.¹⁵⁸

The bias of the constitutional structure against congressional involvement and in favor of the states in selecting the President adds further evidence against the ECA. The ECA violates the Constitution because it allows a past Congress to bind electors who are not subject to Congress, bind the special joint meeting of the Vice President and Congress to count the votes, and bind future Congresses.¹⁵⁹ If not Congress, who decides the disputes? In Kesavan's view, the bodies that constitute the current Congress—the House and Senate that observe the opening of the electoral votes—review the legitimacy of electoral votes.¹⁶⁰ While Congress cannot use legislation to bind future Houses and Senates in their review, the two houses could decide to follow the procedures of the ECA at the time of the opening of the ballots.¹⁶¹

156. *Id.* at 1701–10; U.S. CONST. art. II, § 1, cl. 2.

157. Kesavan, *supra* note 26, at 1729–43.

158. *Id.* at 1747–58.

159. *Id.* at 1782–93.

160. *Id.* at 1720–23.

161. After *Bush v. Gore*, Sanford Levinson and Ernest Young argued that the Twelfth Amendment provides a system for resolving disputes, without using the Supreme Court. They pointed out that the 2000 election itself contained a question concerning the legitimacy of electoral votes: whether Republican vice-presidential candidate Dick Cheney lived in Texas or Wyoming. If the former, then Texas's electors could not cast votes for both George W. Bush and Cheney under the Twelfth Amendment. They suggest that the *Bush v. Gore* Court erred in ignoring the political question doctrine because the Twelfth Amendment committed the resolution of disputes over the electoral count to Congress, except to the extent the Court genuinely believed the equal protection rights of Florida's voters were violated. They train their analysis, however, primarily upon the habitation rule, the political question doctrine, and the House's authority to choose the President in the event no candidate

John Harrison reached a very different conclusion. He asserts that “[d]ispute resolution is not an exercise of legislative power” and that the Constitution does not explicitly grant Congress this non-legislative function, as, for example, it does with impeachment.¹⁶² This stands in contrast with Congress’s authority under Article I, Section 5 to judge the elections of its members.¹⁶³ Harrison suggests that the Vice President must have the power to judge electoral votes, because in order to decide which certificates to open, she must first judge which electors were validly appointed.¹⁶⁴ Congress can “no more control the exercise of this constitutionally granted authority than it may tell the President whom to pardon.”¹⁶⁵ This reading reinforces the Framers’ goal of maintaining presidential independence from Congress and centering the electoral process in the states. The House and Senate attend the opening of the electoral votes for ceremonial reasons only.¹⁶⁶ Harrison concludes with the worry that the Constitution does not provide any rule of decision for resolving disputes, that neither Congress nor the states can impose one, and that therefore any solution will come about in an ad hoc, extra-constitutional manner—much like the Hayes-Tilden Electoral Commission of 1876.¹⁶⁷

Shortly after the 2000 dispute, a unique account of the Twelfth Amendment emerged from Bruce Ackerman and David Fontana.¹⁶⁸ They agreed that the amendment’s text is ambiguous about the resolution of competing slates of electors due to the use of the passive voice in the counting of votes.¹⁶⁹ Putting aside textual and structural considerations, Ackerman and Fontana instead sought an answer in the actions of Vice President John Adams in the election of 1796 and of Vice President Thomas Jefferson in the election of 1800, which they believed must have informed the ratification of the amendment.¹⁷⁰ In both cases, states sent electoral votes over which doubt had arisen. In 1796, Vermont sent electoral votes for Adams and Thomas Pinckney, his Federalist running mate, which met all formal requirements but

wins a majority of the electoral votes. Sanford Levinson & Ernest A. Young, *Who’s Afraid of the Twelfth Amendment*, 29 FLA. ST. U. L. REV. 925, 926, 942, 955–56 (2001).

162. Harrison, *supra* note 26, at 702.

163. “Each House shall be the judge of the elections . . . of its own members” U.S. CONST. art. I, § 5, cl. 1.

164. Harrison, *supra* note 26, at 702–03.

165. *Id.* at 703.

166. *Id.* at 705.

167. *Id.* at 714–15.

168. *See generally* Ackerman & Fontana, *supra* note 27.

169. *Id.* at 552.

170. *Id.*

which were surrounded by questions over the legality of the process used by the state legislature.¹⁷¹ In 1800, Georgia sent votes for Jefferson and running mate Aaron Burr that failed to meet the formal rules for electoral votes, even though there were no doubts about the results of the election in Georgia.¹⁷² In both cases, the sitting Vice Presidents called the electoral votes in their favor without challenge from the House and Senate, which were sitting in observation.¹⁷³

The resolution in favor of the sitting Vice Presidents essentially gave them the Presidency. In Adams's case, Vermont's four electoral votes gave him the three-vote margin by which he won the election of 1796 over Jefferson.¹⁷⁴ As for Jefferson, the Georgia vote gave him a tie with Burr sufficient to throw the election to the House for a head-to-head contest in 1800. If Jefferson had rejected Georgia's vote, five candidates would have gone to the Federalist-dominated House, including Adams and his Federalist running mate.¹⁷⁵

Ackerman and Fontana described an early practice that left the Vice President with the power to resolve such disputes. They observed that this system must be a mistake, given the potential for self-dealing by sitting Vice Presidents who run for President. "Had the [Philadelphia] Convention considered the likelihood that the President of the Senate might run for the presidency, [the Framers] would have changed the text in a minute," they write. "But they did not, so they did not do so, and this failure is nothing to brag about."¹⁷⁶ The Framers most likely would have vested the duty in the Chief Justice, "the only constitutional official possessing the impartiality required of the vote-counting job," but this was imperfect—witness that the Chief Justice in 1801 would have been John Marshall, chosen by Adams after the 1800 election.¹⁷⁷ To prevent a potential fiasco over the counting of the votes by the Vice President, Ackerman and Fontana called for a constitutional amendment. But in the absence of such an amendment, they observed that the Vice President's role is textually plausible and is the result of "the conscientious practice of leading statesmen who have attempted to make sense of textual perplexity," i.e., Thomas Jefferson.¹⁷⁸

The 2020 controversy brought renewed interest in the Twelfth Amendment. Even before the events of January 6, 2021, Edward Foley

171. *Id.* at 567–81.

172. *Id.* at 581–99.

173. *Id.* at 579–81, 599–610.

174. *Id.* at 553.

175. *Id.* at 553–54.

176. *Id.* at 626.

177. *Id.* at 626–67.

178. *Id.* at 629–31.

warned of the disorder that could erupt in a disputed election, especially were President Trump to allege fraudulent voting in battleground states.¹⁷⁹ Foley agrees that the amendment's text is vague and does not assign the responsibility of resolving disputes over the electoral votes.¹⁸⁰ He argues that states generally must decide such controversies, relying on the legislative history of a bill introduced in 1800, shortly before consideration of the amendment. The bill would have created a "Grand Committee" to resolve electoral votes disputes but would have respected a state's decision over the appointment of electors.¹⁸¹ Although Foley acknowledges that the argument in favor of the Vice President's right not just to open but to judge electoral votes "has a significant historical pedigree," he finds that more scholars agree that the Necessary and Proper Clause vests Congress with the authority to fill in the gap left by the Twelfth Amendment.¹⁸² Assuming that Congress has that power, the ECA allows Congress and not the Vice President to resolve a dispute when a state sends two competing slates of electors, and even then defers to the certification by a governor of electoral votes that meet the statutory deadlines.¹⁸³ Foley, however, does not firmly come down on the Vice President's or Congress's side. He notes instead that parties to a dispute will deploy these arguments to prevail in an election, and that the Twelfth Amendment's ambiguity will not be solved until Congress ratifies a new constitutional amendment.¹⁸⁴

Also addressing the 2020 controversy, Professors Jack Beermann and Gary Lawson proposed a far more radical outcome. They read the ECA to mean that courts should review disputed electoral votes. They were skeptical (as we are) that the Constitution assigns Congress any role. "[I]t would be unconstitutional for the assembled House and Senate to reject certificates [of electoral votes] for any reason, even a reason covered by [the ECA]," they maintain.¹⁸⁵ Instead, the two believe that the role of resolving disputes falls on the Vice President, subject to judicial review. Congressmen appear to be mere witnesses to the opening of ballots. Why have Congress present at all? Congress might be needed to perform its function of choosing the President and Vice President when the Electoral College fails to yield a majority. Congress

179. Foley, *supra* note 24, at 309.

180. *Id.* at 324–25; *see also* FOLEY, *supra* note 21, at 71–72.

181. FOLEY, *supra* note 21, at 72.

182. Foley, *supra* note 24, at 326–27.

183. *Id.* at 329–31. *See generally* Siegel, *supra* note 139, at 626–28.

184. Foley, *supra* note 24, at 327.

185. Jack Beermann & Gary Lawson, *The Electoral Count Mess: The Electoral Count Act of 1887 Is Unconstitutional, and Other Fun Facts (Plus a Few Random Academic Speculations) About Counting Electoral Votes*, 16 FIU L. REV. 297, 300–01 (2022).

cannot resort to the Necessary and Proper Clause to regulate electors because the state legislatures, which choose the electors, do not qualify as “the Government of the United States” or “any Department or Officer thereof” within the provision’s terms.¹⁸⁶ “[T]he only constitutional role plausibly attributable to Members of Congress in the tabulation process is the arithmetic counting of votes in certificates opened by the Vice President,” they concluded.¹⁸⁷

Though Beermann and Lawson do not present a strong case for locating the responsibility in the Vice President, they find two problems with vesting the power in Congress. First, they observe that the Twelfth Amendment textually assigns Congress only the role of witnessing the opening and counting of ballots, and then gives separate authority to the House and the Senate to elect the President and Vice President should no majority prevail. If the Founders wanted Congress to also resolve disputes over electors, they would have said so, especially since that role would otherwise violate bicameralism and presentment. Second, the Framers would not have wanted the House to have the ability to dictate the winner by majority vote in light of the Twelfth Amendment, which declares that a state delegation rule limits the House’s right to choose the President if no majority were to emerge. If the Constitution excludes Congress from reviewing electoral votes, Beermann and Lawson reason by process of elimination that either the states or the Vice President must have the power.¹⁸⁸

We argue that the Framers did not want direct congressional involvement in choosing the President. While scholars have observed the constitutional silence on resolving disputes over electors, they failed to give due consideration to constitutional text and structure. Some scholars claim that Congress can fill any lacunae, simply because the Twelfth Amendment orders that the electoral votes be counted before both houses.¹⁸⁹ Others invoke the Necessary and Proper Clause, because rules are needed “for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹⁹⁰ We believe that constitutional text, structure, and especially history present a more complete answer. The Vice President, rather than Congress, has the best claim to the dispute resolution role, albeit only with regard to conflicting slates of electors emerging from the states. The next Part explains why.

186. *Id.* at 299–301, 309.

187. *Id.* at 299.

188. *Id.* at 305–06.

189. Kesavan, *supra* note 26, at 1795–96.

190. Foley, *supra* note 24, at 326–27; U.S. CONST. art. I, § 8.

II. THE CONSTITUTIONAL TEXT AND STRUCTURE: HOW PRESIDENTS ARE CHOSEN

This Part presents our reading of constitutional text and structure. We argue that textual and structural clues in the Constitution support our reading of the Framers' broader purpose to exclude Congress from the selection of the President, and thus from reviewing the legitimacy of electors. Neither Article II nor the Twelfth Amendment plainly assigns the responsibility for resolving disputes over electors. The best reading of the Constitution leaves the role in the hands of the Vice President when neither the states nor the judiciary have decided such disputes beforehand. This Part concludes by critiquing alternative arguments in favor of Congress's role in reviewing electoral votes.

A. Constitutional Text

Constitutional text and structure do not permit a simple majority of the American people to select the President. As it does with other important acts, the Constitution mixes different forms of democracy, representation, and state involvement to choose the Chief Executive. Article II and the Twelfth Amendment, as implemented by the state legislatures, require that voters choose electors from their state equal in number to their House members and Senators. The Constitution's grant of two electors to each state to account for the number of Senators has the effect of giving an advantage to smaller states in selecting the President.¹⁹¹

In the 2020 election, for example, Wyoming, the smallest state in the United States (568,300 citizens in 2010), received three electoral votes, while California, the largest (37,341,989 citizens in 2010), received fifty-five.¹⁹² Because of this nod to federalism, each Wyoming voter in the election had 3.6 times more weight than a California voter.

The Constitution grants the right to choose electors to the states rather than to individual voters or to the federal government. In fact, the Constitution singles out a specific branch of the state government to bear this responsibility—the legislature. Article II, Section 1 provides that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.”¹⁹³ This language reflects the Framers' desire to ensure that the President is as independent of

191. John Yoo, *A Defense of the Electoral College in the Age of Trump*, 46 PEPP. L. REV. 833, 835 (2019).

192. U.S. CENSUS BUREAU, U.S. Dep't of Com., *United States Summary: 2010 III-3* (2012), <https://www2.census.gov/library/publications/decennial/2010/cph-2/cph-2-1.pdf> [<https://perma.cc/LG3P-PE25>].

193. U.S. CONST. art. II, § 1, cl. 2.

Congress as possible,¹⁹⁴ and to create a filter that dilutes popularity as a means of election. “The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors,” the Supreme Court observed in *McPherson v. Blacker*.¹⁹⁵ “It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.”¹⁹⁶

In this respect, the Constitution depends on the states for successful operation of the federal government. State legislatures, for example, draw House districts after every decennial census and set the basic time, place, and manner for elections.¹⁹⁷ State legislatures also directly chose the senators until the ratification of the Seventeenth Amendment, which transferred the power from state legislatures to their peoples. Article I, Section 3 originally declared that “[t]he Senate of the United States shall be composed of two senators from each State, chosen by the Legislature thereof, for six Years.”¹⁹⁸ This symbiosis between the federal and state governments comports with the state authority to select presidential electors. As James Madison wrote, the states “may be regarded as constituent and essential parts of the federal government.”¹⁹⁹ The states in turn rely on federal institutions for political representation, common defense, foreign affairs, and free trade. Without state cooperation, the federal government cannot function, an important element of the fundamental bargain that created the Constitution.

To underscore the importance of state sovereignty, the Constitution identifies state legislatures specifically rather than states as corporate entities. For instance, the Constitution singles out state legislatures instead of states themselves when it grants the power to draw

194. *See, e.g.*, Ross & Josephson, *supra* note 96, at 670–71. By way of comparison, Article I, Section 2, Clause 3 directs that the decennial census “shall be made . . . in such Manner as they [i.e., Congress] shall by Law direct.” U.S. CONST. art. I, § 2, cl. 3. The explicit reference here to “Congress” was intended to exclude the *states* from conducting the census. *See Utah v. Evans*, 536 U.S. 452, 491 (2002) (Thomas, J., concurring in part and dissenting in part).

195. 146 U.S. 1, 27 (1892).

196. *Id.*

197. U.S. CONST. art. I, § 2 (census); *id.* art. I, § 4 (time, place, and manner).

198. *Id.* art. I, § 3.

199. THE FEDERALIST No. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961); *see also* John C. Harrison, *In the Beginning Are the States*, 22 HARV. J.L. & PUB. POL’Y 173, 173 (1998) (“[T]he Constitution, the federal government, and federal law are a superstructure built on top of something else—the states.”).

congressional districts. It also mandates state legislatures to ratify amendments to the Constitution.²⁰⁰ In *Arizona State Legislature v. Arizona Independent Redistricting Commission*,²⁰¹ however, the Supreme Court rejected the idea that the Constitution's use of the phrase "state legislatures" prevented the transfer, by popular initiative, of the power to draw congressional districts to an independent state body.²⁰² *Arizona State Legislature* held that the Constitution's textual appointment of state legislatures to draw congressional districts merely referred to the "power that makes laws" and thus ultimately referred to the people of a state.²⁰³ We think, however, that the Court misread the constitutional text.²⁰⁴ If the Court were correct, for example, the Seventeenth Amendment would have been unnecessary.

Unlike the explicit transfer of power over selection of senators, state legislatures have not lost their constitutional authority over presidential electors. Early practice shows that the legislatures commonly designated the electors themselves. "Fifteen States participated in the second presidential election [of 1792], in nine of which electors were chosen by the legislatures," the Court observed in *McPherson*.²⁰⁵ Over the course of the nineteenth century, however, state legislatures created mechanisms where they appointed electors who promised to vote for the winner of the popular election in their states. By 1824, the Court found that presidential electors were chosen by popular vote "in all the States excepting [six], where they were still chosen by the legislature."²⁰⁶ Today all state legislatures delegate the selection of electors to popular vote.²⁰⁷ All but two states (Nebraska and Maine) follow a winner-takes-all approach that grants all of their electoral votes to the popular vote winner in their state.²⁰⁸

Even though states have chosen to appoint electors by popular vote, they may resume their constitutional power to directly choose electors. As the Supreme Court explained in *Bush v. Gore*:

200. U.S. CONST. art. II, § 2, cl. 1; *id.* art. II, § 3, cl. 1; *id.* art. V; *Hawke v. Smith*, 253 U.S. 221, 226–30 (1920).

201. 576 U.S. 787 (2015).

202. *Id.* at 822–23.

203. *Id.* at 813–14.

204. *See generally* Saikrishna Bangalore Prakash & John Yoo, *People ≠ Legislature*, 39 HARV. J.L. & PUB. POL'Y 341 (2016).

205. *McPherson v. Blacker*, 146 U.S. 1, 30 (1892).

206. *Id.* at 31–32.

207. *Presidential Election Process*, USA.GOV, <https://www.usa.gov/election> [<https://perma.cc/T2TY-C7YG>] (Sept. 13, 2022).

208. *Electoral College, Frequently Asked Questions*, NAT'L ARCHIVES, <https://www.archives.gov/electoral-college/faq> [<https://perma.cc/ZT35-7R2K>] (last visited Apr. 13, 2020).

The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college. . . . This is the source for the statement in *McPherson v. Blacker* . . . that the state legislature’s power to select the manner for appointing electors is plenary; *it may, if it so chooses, select the electors itself*, which was indeed the manner used by state legislatures in several States for many years after the framing of our Constitution.²⁰⁹

Not only is the authority to select the electors revocable, but states control the manner of selection. A state need not vest the selection of the President in the people, but if it does, it controls the conduct of the election itself.²¹⁰ We can infer this from a comparison with the Constitution’s treatment of congressional elections. Article I, Section 4, states that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof.”²¹¹ States bear the primary duty to manage elections for Congress, which they continue to fulfill today. But the same constitutional provision allows Congress to override these arrangements: “the Congress may at any time by Law make or alter such Regulations, except as to the Places of ch[oo]sing Senators.”²¹²

By this text, Congress’s power to override state time, place and manner policies applies only to elections for members of the House and Senate. The Constitution could have vested Congress with this authority for all federal elections, but it did not. Other provisions of the Bill of Rights and the Reconstruction Amendments, such as the Fifteenth Amendment’s right to vote, regardless of race, would apply should state legislatures choose to put the choice of electors to the people.²¹³ Even with the limits recently identified by the Court in *Shelby*

209. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) (emphasis added).

210. On the variety of methods used by the states to appoint electors in the first four presidential elections, see EDWARD B. FOLEY, *PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE* 16–26 (2020).

211. U.S. CONST. art. I, § 4, cl. 1.

212. *Id.*

213. See James C. Kirby, Jr., *Limitations on the Power of State Legislatures over Presidential Elections*, 27 L. & CONTEMP. PROBS., 495, 496–97 (1962). In *Williams v. Rhodes*, 393 U.S. 23, 29 (1968), the Court said:

Nor can it be thought that the [states’] power to select electors could be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws. Clearly, the Fifteenth and Nineteenth Amendments were intended to bar the Federal Government and

*County v. Holder*²¹⁴ and *Brnovich v. Democratic National Committee*,²¹⁵ Section 2 of the Fifteenth Amendment grants Congress the power to legislate if a state abridged voting rights on account of race.²¹⁶ But the Constitution does not otherwise grant Congress the power to regulate the time, place, or manner of elections prescribed by state legislatures in presidential elections. This further reinforces the principle that Congress has no general power to intervene in state selections of presidential electors.

Several principles support this conclusion. First, the canon of *expressio unius est exclusio alterius* holds that the inclusion of one thing excludes others.²¹⁷ The Supreme Court has invoked the canon in its constitutional jurisprudence.²¹⁸ Scholars, however, continue to debate whether this canon should govern constitutional interpretation. While authors as different as Bryan Garner and Justice Antonin Scalia on the one hand,²¹⁹ and William Eskridge on the other,²²⁰ may differ on the normative justification for using such canons, they agree that the canon should inform the reading of legal texts.²²¹ Specifically establishing a congressional power to regulate federal legislative elections, but then

the States from denying the right to vote on grounds of race and sex in presidential elections. And the Twenty-fourth Amendment clearly and literally bars any State from imposing a poll tax on the right to vote “for electors for President or Vice President.” Obviously we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions. We therefore hold that no State can pass a law regulating elections that violates the Fourteenth Amendment’s command that “No State shall . . . deny to any person . . . the equal protection of the laws.”

214. 570 U.S. 529 (2013).

215. 141 S. Ct. 2321, 2326 (2021).

216. See *Shelby Cnty.*, 570 U.S. at 553; *Brnovich*, 141 S. Ct. at 2330. Further, as construed by the Court, Section 5 of the Fourteenth Amendment would also empower Congress to regulate state abridgements of the right to vote based on race or other impermissible factors. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

217. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 107 (2012).

218. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 n.9 (1995) (citing evidence from CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 421 (1937)).

219. See generally SCALIA & GARNER, *supra* note 217.

220. See generally WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 78–79 (2016).

221. See generally *id.* at 78–83.

omitting a similar congressional power over the selection of presidential electors, signifies an intention to leave the latter out of the text.

Second, comparison of Congress's power to override state election rules in congressional elections with the clauses regulating presidential selection suggests that the selection of electors is not a federal prerogative. The Framers included the power to override state rules in Article I, which establishes Congress and vests it with a variety of powers. The Framers created the Presidency and vested it with the executive power in Article II, and specifically addressed the choice of electors in Article II, Section 1, Clauses 2 and 3. Clause 2 specifically declares that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."²²² Both clauses concerning elections (congressional or presidential) specifically give the power to the state legislature to control the "manner" of election. Article II, Section 1 also gives Congress the authority to set "the Time of ch[oo]sing the Electors, and the Day on which they shall give their Votes,"²²³ just as Article I allows Congress to set the time of congressional elections.²²⁴ But Article II nowhere gives Congress the power to participate in the "manner" or "place" of presidential elections. This structural difference further reinforces the implication of applying the *expressio unius* canon.

Finally, yet another textual consideration argues against a congressional role in resolving disputes over electoral votes. Elsewhere, the Constitution expressly vests Congress with the authority to settle arguments over contested elections. Article I, Section 5 states that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members."²²⁵ Under this power, Congress occasionally has taken up challenges to the winners of elections, even when certified by the states. In 1984, for example, the House declared Democrat Frank McCloskey the winner over Republican Richard McIntyre by four votes out of 233,000.²²⁶ While the Supreme Court has held that Congress cannot add to the qualifications set out in the Constitution for elections, it also has held each house's resolution of election disputes over its own membership to be immune to judicial

222. U.S. CONST. art. II, § 1, cl. 1–2.

223. *See id.* art. I, § 4, cl. 1; *see also id.* art. II, § 1, cl. 2, 4.

224. *Id.* art. I, § 4, cl. 1.

225. *Id.* art. I, § 5, cl. 1.

226. Martin B. Gold & Ronald Weich, *Common Interpretation: Article I, Section 5*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/760> [<https://perma.cc/3E8P-8UZS>] (last visited Oct. 16, 2022); *see also* Kristen R. Lisk, Note, *The Resolution of Contested Elections in the U.S. House of Representatives: Why State Courts Should Not Help with the House Work*, 83 N.Y.U. L. REV. 1213, 1243–44 (2008).

review.²²⁷ The Constitution does not explicitly grant Congress a similar role in resolving disputes involving electors. As John Harrison has observed, “[W]hen the Constitution’s drafters wanted to give some institution authority to judge elections, they knew how to do so.”²²⁸

B. Constitutional Structure

Turning from constitutional text to structure and purpose, we discover further reasons to find that Congress is usually excluded from selecting the President. The overarching principles of federalism and separation of powers point to that conclusion.

First, the Constitution only delegates limited, enumerated powers to the federal government. Although they rejected the excessive decentralization of the Articles of Confederation, the Founders did not create a purely national government either. “The proposed Constitution, therefore . . . is, in strictness, neither a national nor a federal constitution; but a composition of both,” James Madison explained.²²⁹ It grants limited, enumerated powers to the federal government while reserving the rest to the states or the people. Madison further observed that the federal government’s “jurisdiction extends to certain enumerated objects only,” while the states continued to possess “a residuary and inviolable sovereignty over all other objects.”²³⁰ Without any clear textual authorization, Congress cannot claim any power over the manner in which states choose electors.²³¹ The Framers went further than just limit the subjects over which Congress could regulate: they also established institutional checks, such as the Senate and the Electoral College, whereby the states themselves were critical to the workings of the federal government. As Madison asked in the Virginia state ratifying convention: “Are not the States integral parts of the General Government?”²³²

Second, keeping Congress out of the state process for choosing electors served both federalism and separation of powers. The history and background of the Constitution’s original provisions clearly

227. *Barry v. United States*, 279 U.S. 597, 613 (1929); *Reed v. Cnty. Comm’rs*, 277 U.S. 376, 388 (1928); *see also Roudebush v. Hartke*, 405 U.S. 15, 19 (1972).

228. Harrison, *supra* note 26, at 702.

229. THE FEDERALIST No. 39, at 214 (James Madison) (Clinton Rossiter ed., 1961).

230. *Id.* at 213.

231. *Compare* *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 796 n.12, *with id.* at 848 (Thomas, J., dissenting) (disagreeing over whether in default of a specific grant of power to the federal government, that power is reserved to the states).

232. James Madison on Direct Taxation by the Federal Government (June 11, 1788), *in* 2 THE DEBATE ON THE CONSTITUTION 658 (Bernard Bailyn ed., 1993).

demonstrate this. Several of the leading delegates had traced major defects in the revolutionary state constitutions' efforts to subjugate their executives to legislative assemblies.²³³ In all but one state, assemblies elected the governor, and most states provided for either annual election, restricted terms, or both. Some even further dispersed executive power by requiring the consent of a council of state, chosen also by the legislature, for any significant decisions.²³⁴ The councils often made governors "little more than chairmen of their executive boards."²³⁵ A legislative supremacy prevailed that created political instability and oppressed individual liberties.²³⁶ "The Executives of the States are in general little more than cyphers; the legislatures omnipotent," James Madison declared in the Constitutional Convention. Legislative dominance produced "instability [and] encroachments" which would make "a revolution of some kind or other . . . inevitable."²³⁷

As a result of this revolutionary experience, the Framers decisively rejected a congressional role in picking the President. The mechanism of presidential selection balanced many of the same competing forces that affected the design of the rest of the Constitution: the struggle between big states and little states, nationalism versus federalism, North versus South, free states versus slave states.²³⁸ James Wilson and James Madison eventually persuaded the Convention that a single President ultimately elected by the people through their state

233. See GORDON S. WOOD, *POWER AND LIBERTY: CONSTITUTIONALISM IN THE AMERICAN REVOLUTION* 38–40 (2021) (describing the unprecedentedly limited role given to governors in the state constitutions of the Revolutionary period); *id.* at 71 (describing efforts in Massachusetts and elsewhere to restore power to state governors); see also KLARMAN, *supra* note 101, at 213–14, 237–38.

234. YOO, *CRISIS AND COMMAND*, *supra* note 51, at 11–12.

235. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 138 (1969).

236. *Id.* at 454.

237. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 35 (Max Farrand ed., 1911) [hereinafter 2 *FARRAND'S RECORDS*]; see also KLARMAN, *supra* note 101, at 242–43 (2016) (other contemporary expressions of dissatisfaction with legislative dominance in States); James P. Pfiffner & Jason Hartke, *The Electoral College and the Framers' Distrust of Democracy*, in 3 *WHITE HOUSE STUD.* 261, 261–62 (2003).

238. Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 *J. AM. HIST.* 35, 36–37 (1986).

legislators or electors would give the “most energy[,] dispatch[,] and responsibility.”²³⁹

The path to the Electoral College system was not straightforward. The Convention explored two major alternatives—congressional appointment of the executive, and a simple majority vote by the people—before finally adopting the Electoral College. The initial proposal, set out in the Virginia Plan, envisioned a system not unlike the later parliamentary democracies of Western Europe. Drafted by James Madison and introduced by Virginia governor Edmund Randolph on May 29, 1787, the Virginia Plan would have created a national executive “to be chosen by the National Legislature.”²⁴⁰ The proposal was eventually rejected: many of the Framers believed that legislative control over the executive in the revolutionary state constitutions had produced unstable and unfair laws, government favoritism and partisanship, and flagrant abuse of property and contract rights.²⁴¹

Choosing the President by direct popular majority vote loomed as the alternative once the Great Compromise gave the Senate a veto over all congressional decisions.²⁴² On July 17, 1787, for example, Gouverneur Morris demanded that the President “ought to be elected by the people at large, by the freeholders of the Country,” who would “never fail to prefer some man of distinguished character, or services; some man, if he might so speak, of continental reputation.” If Congress selected him, on the other hand, “[h]e will be the mere creature of the Legis[ature]” and the choice would be “the work of intrigue, of cabal, and of faction.”²⁴³ When some delegates worried that a majority of the American people would not agree on a single candidate, Wilson proposed sending such deadlocks to Congress. After questioning whether the people had sufficient experience and wisdom, the Convention on July 19, 1787, replaced legislative selection of the

239. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65 (Max Farrand ed., 1911) [hereinafter 1 FARRAND’S RECORDS].

Madison, who had initially favored congressional selection of the executive, later identified “insuperable objections” to that approach. If it was “essential to the preservation of liberty” that the great powers of government be independently exercised by three different branches, then it made little sense to render the executive dependent on Congress for his selection.

KLARMAN, *supra* note 101, at 227.

240. 1 FARRAND’S RECORDS, *supra* note 239, at 21.

241. See WOOD, *supra* note 233, at 129, 147.

242. See Yoo, *supra* note 191, at 849.

243. 2 FARRAND’S RECORDS, *supra* note 237, at 29.

President with an Electoral College system.²⁴⁴ Despite a series of twists and turns that saw legislative selection return then disappear, the Convention ultimately kept the Electoral College.²⁴⁵ In defending the final version of the Constitution, Morris explained that “[no one] had appeared to be satisfied with an appointment by the Legislature” and “[m]any were anxious even for an immediate choice by the people.”²⁴⁶ Relying on electors would address “the danger of intrigue [and] faction if the appointm[ent] should be made by the Legislature” and “the indispensable necessity of making the Executive independent of the Legislature.”²⁴⁷

During the ratification struggle, the Federalists emphasized the need to maintain presidential independence from Congress.²⁴⁸ Living under revolutionary state constitutions that had subordinated governors, nationalists portrayed unlimited legislative power as the problem and a reinvigorated executive as the answer.²⁴⁹ “In republican government the legislative authority, necessarily, predominates,” James Madison declared. So “the weakness of the executive may require, on the other hand, that it be fortified.”²⁵⁰ In his defense of the Constitution, Alexander Hamilton recognized that a republican legislature could represent the truest voice of the people. But, he warned, it could also fall prey to “every sudden breeze of passion” and “every transient impulse,” due to the flattering “arts of men.”²⁵¹ The gravest threat to the separation of powers would come from the “propensity of the [legislature] to intrude upon the rights, and to absorb the powers, of the other departments.”²⁵² According to Hamilton, therefore, an

244. *Id.* at 58. Some eighteenth-century and earlier systems had vested the choice of the executive in bodies of “electors.” See generally Robert J. Delahunty, *Is the Uniform Faithful Presidential Electors Act Constitutional?*, 2016 CARDOZO L. REV. DE-NOVO 165, 171 (2016). The Framers were surely aware of this method. Popes had been elected by the College of Cardinals for centuries; the King of England, whose subjects the Framers had once been, was, as King of Hanover, an “elector” for the Holy Roman Emperor; nearer to home, the state of Maryland also employed “electors.” *Id.* at 171 & n.30.

245. Yoo, *supra* note 191, at 852.

246. 2 FARRAND’S RECORDS, *supra* note 237, at 500.

247. *Id.*

248. THE FEDERALIST No. 70, at 392 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

249. YOO, CRISIS AND COMMAND, *supra* note 51, at 12–14.

250. THE FEDERALIST No. 48, at 290–91 (James Madison) (Clinton Rossiter ed., 1961).

251. THE FEDERALIST No. 71, at 400 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

252. THE FEDERALIST No. 73, at 410 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

independent executive would check those “irregular and high-handed combinations which sometimes interrupt the ordinary course of justice” and “enterprises and assaults of ambition, of faction, and of anarchy.”²⁵³ Giving Congress the power to choose the President would reject the lessons that the Framers had drawn from the disastrous revolutionary experience and defeat the ability of the executive to check Congress.

Congress received a backup role in presidential selection in the event that a majority of the electors could not agree on a candidate. In the event of a tie, the House of Representatives would choose between the two.²⁵⁴ If no candidate received a majority, the House would select a President from among the top five finishers.²⁵⁵ But even in designing this backup system, the Framers sought to reinforce federalism, rather than rely upon ordinary congressional processes. The Framers chose not to leave the decision to simple majorities in Congress, which would reflect the overall national popular majority, but instead devised a procedure that reflected the wishes of the majorities within each state. In both cases (a tie or the absence of an electoral vote majority), the House votes by state delegations, with each state wielding a single vote.²⁵⁶ While the Senate had no role in the selection of the President, it had the right to choose if there was a tie for Vice President.²⁵⁷

Here, the *expressio unius* canon again has relevance. Directly after Article II, Section 1’s description of the counting of electoral votes and the roles of the House and Senate when no candidate wins a majority, the Constitution gives Congress the power to “determine the Time of ch[oo]sing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”²⁵⁸ After this clause, Article II then sets out the minimum qualifications

253. THE FEDERALIST No. 70, at 391 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

254. U.S. CONST. art. II, § 1, cl. 3.

255. *Id.*

256. As Madison explained:

The executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies, partly as unequal members of the same society. The eventual election, again, is to be made by that branch of the legislature which consists of the national representatives; but in this particular act they are to be thrown into the form of individual delegations from so many distinct and coequal bodies politic.

THE FEDERALIST No. 39, at 212 (James Madison) (Clinton Rossiter ed., 1961).

257. U.S. CONST. art. II, § 1, cl. 3.

258. *Id.* cl. 4.

for President—chiefly the natural-born citizen and age requirements.²⁵⁹ If the Framers had wanted to give Congress a broader power to regulate the processes of choosing the President or resolving disputes over the electoral votes, they should have done it at this spot in the Constitution—between the recital of Congress’s regulatory authorities and the qualifications for being President. But they did not.

In other words, the original Constitution excluded Congress from the resolution of disputes over electors. Article II, Section 1 ordered electors to meet in their states and vote for two candidates for President, with one having to come from a different state. They were to sign, certify and seal, and then transmit their votes to the President of the Senate.²⁶⁰ Section 1 then directed that “[t]he President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.”²⁶¹ Whoever received a majority of the electors’ votes became President, and the runner up became Vice President. Congress’s role in the presidential selection process, except when the electoral vote was tied or failed to produce a majority, was minimal.²⁶² This result accorded with the Framers’ conception of separation of powers and the independence of the President from Congress.

Although the Framers had at first expressed satisfaction with these arrangements,²⁶³ Article II’s original incarnation soon created a problem due to its failure to separate ballots for President and Vice President. In the election of 1800, Democratic candidate Thomas Jefferson and his running mate, Aaron Burr, tied with seventy-three electoral votes, while incumbent President John Adams received only sixty-five votes and his Federalist running mate Thomas Pinckney received sixty-four. Even though the Jefferson-Burr ticket won, the tie threw the choice to the House of Representatives, where Federalists held the balance of power. Hamilton’s detestation of Aaron Burr, coupled with other

259. “No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.” *Id.* cl. 5.

260. “The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate.” *Id.* cl. 3.

261. *Id.*

262. *Id.*

263. See THE FEDERALIST No. 68, at 379 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

factors, persuaded the Federalists to allow Jefferson to prevail over Burr on the thirty-sixth ballot in the House.²⁶⁴

Ratified in 1804, the Twelfth Amendment corrected the Jefferson-Burr problem.²⁶⁵ It required electors to cast distinct votes for President and Vice President.²⁶⁶ But it otherwise made no significant changes in the process of counting the electoral votes. It repeats Article II, Section 1's process that the electors sign, certify, and transmit their sealed votes to the President of the Senate.²⁶⁷ As to the counting of the vote, it declares: "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."²⁶⁸ The amendment appears to make no significant change in the text of the counting of the electoral vote.

Should the Electoral College fail to yield a winner, the Twelfth Amendment left Article II's original backup system largely intact. In order to prevail in the Electoral College, a candidate must win "a majority of the whole number of Electors appointed."²⁶⁹ If no candidate wins the necessary 270 electoral votes, the amendment vests the right to choose the President in the House of Representatives, which picks from the top three finishers of the electoral vote. But "the votes shall be taken by states, the representation from each state having one vote."²⁷⁰ The amendment requires a quorum of two-thirds of the state

264. See 6 ANNALS OF CONG. 1033-34 (1800); SUSAN DUNN, JEFFERSON'S SECOND REVOLUTION: THE ELECTION CRISIS OF 1800 AND THE TRIUMPH OF REPUBLICANISM 195-214 (2004).

265. Congress proposed the Twelfth Amendment for ratification by the states on December 9, 1803. On January 25, 1804, Secretary of State James Madison declared that the proposed amendment had been ratified. See Levinson & Young, *supra* note 161, at 927 n.6. On the ratification history and original purposes of the amendment, see FOLEY, *supra* note 21, at 34-45; TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787-1804, at 155-161 (1994); and Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 WM. & MARY L. REV. 1501, 1542-54 (2014). See also David Fontana, *The Second American Revolution in the Separation of Powers*, 87 TEX. L. REV. 1409, 1425-29 (2009).

266. U.S. CONST. amend. XII.

267. *Id.*

268. *Id.*

269. *Id.* Commentators have differed over whether this means a majority of the 538 possible electoral votes or a majority of the electors actually chosen. This would make a difference, for example, if a state failed to send any electoral votes, which would reduce the number of electors needed to win. If the text requires a majority of the possible 538 electors, then the winner must always garner at least 270 electoral votes. This seems to have been the practice. The question was raised by the 1876 election. See FOLEY, *supra* note 21, at 413 n.27 (2016).

270. U.S. CONST. amend. XII.

delegations and an absolute majority of the fifty states to prevail. In the event no candidate wins a majority of the electoral vote for Vice President, the Constitution vests the right to select in the Senate, which votes by individual senators.²⁷¹ Even here, the Founders were leery of Congress choosing the President, and so gave each house delegation the same vote, rather than allowing a simple majority of the House to decide. Federalism (of a subdued kind) reenters, if through the back door.

C. Founding History

Before leaving the constitutional text and structure, we turn to relevant contextual and historical sources from the Founding period. Scant evidence exists from the Philadelphia Convention or the state ratifying debates on the precise question of dispute resolution over the presidential electors. It might even be fair to say that the Framers did not prepare for such an unlikely problem. But we can still draw some inferences from the manner in which the Framers designed the Electoral College itself. More directly relevant are the examples set out by the revolutionary-era state constitutions, which—other than the Articles of Confederation—were the most important constitutional documents at the time.

Despite its complex design, the Electoral College provoked little controversy during the ratification debates over the Constitution. Alexander Hamilton wrote that the selection of the President “is almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents.”²⁷² Even if the Electoral College “be not perfect,” Hamilton boasted, “it is at least excellent.”²⁷³ Antifederalists did not spend much effort attacking the method for selecting the Presidency.²⁷⁴ To the extent that they objected, they fought to amend the four-year term and re-eligibility.²⁷⁵ If the ratification debates provided the only source for recovering the original understanding of Article II, Section 1 as a dispute-resolution mechanism, we would have to conclude that no reliable evidence exists.

But the means for choosing the President had posed severe challenges during the Philadelphia Convention. Though James Madison’s records of these deliberations did not become public until his death in 1836, the debates showed the delegates attempting to balance

271. *Id.*

272. THE FEDERALIST No. 68, at 411 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

273. *Id.* at 411–12.

274. Slonim, *supra* note 238, at 37–54.

275. KURODA, *supra* note 265, at 17.

multiple goals.²⁷⁶ They rejected congressional selection of the President, which they feared would subordinate the executive power to the legislature.²⁷⁷ At the same time, the Founders feared pure democracy and the demagogues it might bring. They also did not want the states to select the President, which would have the effect of eliminating a popular voice altogether.²⁷⁸ To balance these concerns, the Founders settled on electors who would be selected by the state legislatures, but in proportion to their House and Senate votes.²⁷⁹ Electors would represent the views of the people, but in a diluted form. Electors would “[be] chosen for the occasion . . . meet at once, [and] proceed immediately to an appointment,” James Madison argued in defense of the system, “[with] very little opportunity for cabal[] or corruption.”²⁸⁰ Robert Morris described the Electoral College to the Convention as a compromise because no one “had appeared to be satisfied with an appointment by the Legislature,” but “[m]any were anxious even for an immediate choice by the people.”²⁸¹ The electors would remove “the danger of intrigue [and] faction if the appointm[ent] should be made by the Legislature,” while also addressing “the indispensable necessity of making the Executive independent of the Legislature.”²⁸²

There is no evidence in the historical record of how electoral disputes were to be resolved, though we can reasonably propose that the drafters would not have chosen a mechanism that merely resurrected the dangers that they sought to avoid. It seems unlikely, for example, that the Framers would have rejected direct popular election of the President, but then allowed direct election by a committee to settle a dispute over electors. Similarly, the Framers explicitly rejected legislative selection of the President several times; it would seem contrary to their purpose to then vest in Congress the authority to settle a dispute over electors that could decide a presidential contest. A defender of the ECA’s vestment of that power in Congress, however, might respond that the Twelfth Amendment itself includes a role for the House when it serves as a fallback when a majority of the electors fail to choose a President. While the

276. Edward J. Larson, *Building a Nation from Thirteen States: The Constitutional Convention and Preemption*, 33 PEPP. L. REV. 7, 9–22 (2005).

277. *See supra* note 243 and accompanying text.

278. MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 229–30 (2016); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 263 (1996).

279. U.S. CONST. art. II, § 1, cl. 2.

280. 2 FARRAND’S RECORDS, *supra* note 237, at 109–11.

281. *Id.* at 500.

282. *Id.*

amendment creates such a role for the House, it does not establish the House as the resolver of a dispute. Instead, the House procedure comes into effect when the Electoral College fails. This explicit definition of the role of the House belies the idea that the mechanism for dispute resolution and the mechanism to take effect in the event of a failure of the Electoral College must be identical. Indeed, if such a rule were required, the ECA would violate the Constitution because it does not make the House, voting by state delegations, the tribunal for resolving disputed electoral votes.

We believe that this conclusion receives support from the revolutionary-era state constitutions, which formed the constitutional backdrop for the federal document. The adopters of the state constitutions understood the possibility of creating a legislative committee to resolve disputed elections, as the ECA does. But when the framers of the state constitutions wanted to provide for such a committee, they explicitly set it out in text. Delaware and Pennsylvania adopted new constitutions during the period before and after the adoption of the federal Constitution that bear this point out.

In 1776, Delaware's constitution had given the choice of governor to the state legislature. It provided that the speakers of both houses of the assembly would open the ballots before the legislature, and it gave the power to the speaker of the council to break any ties.²⁸³ In 1792, Delaware's new constitution provided for direct popular election of the governor. Article II of the Delaware constitution retained the process where the speaker opened the election returns in the presence of both houses of the legislature.²⁸⁴ But in the case of "[c]ontested elections of a governor," article III called for a "joint committee, consisting of one-third of all the members of each branch of the legislature" to declare a winner in case the votes were disputed.²⁸⁵ Observe that if the Founders, in a period after the federal Constitution of 1789 but before the ratification of the Twelfth Amendment, wanted to establish a legislative committee to resolve disputed elections for the Chief Executive, they had a model directly before them in Delaware. But they chose not to adopt it.

One might respond that the small state of Delaware would not have drawn the attention of the leaders of the ratification of the Constitution and the Twelfth Amendment. But Delaware did not set out the sole example. Pennsylvania's revolutionary-era constitution of 1776 had also

283. DEL. CONST. art. VII (1776), *in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 563 (Francis Newtown Thorpe ed., 1909) [hereinafter 1 FEDERAL AND STATE CONSTITUTIONS].

284. DEL. CONST. art. III, § 2 (1792), *in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 283, at 572.

285. *Id.* at 572–73.

given to the general assembly the power to choose the executive.²⁸⁶ Pennsylvania's first constitution made no provision for breaking ties or settling disputes.²⁸⁷ But in 1790, the new Pennsylvania state constitution's structure was altered to provide for direct popular election of a governor.²⁸⁸ Pennsylvania's provision bore important similarities to Article II of the U.S. Constitution, written in Philadelphia just two years before:

The governor shall be chosen on the second Tuesday of October, by the citizens of the commonwealth, at the places where they shall respectively vote for representatives. The returns of every election for governor shall be sealed up, and transmitted to the seat of government, directed to the speaker of the senate, who shall open and publish them in the presence of the members of both houses of the legislature. The person having the highest number of votes shall be governor. But if two or more shall be equal and highest in votes, one of them shall be chosen governor by the joint vote of the members of both houses. Contested elections shall be determined by a committee, to be selected from both houses of the legislature, and formed and regulated in such manner as shall be directed by law.²⁸⁹

Observe the close parallels between the system of collecting and opening the electoral votes for President and Pennsylvania's method for counting the votes for governor. In both cases, the constitutions transmit the votes to the seat of government, where the presiding officer of the legislature opens them before the members. But also note that the 1790 Pennsylvania Constitution, unlike Article II of the U.S. Constitution, extends its regulation of the election by providing specifically for a dispute resolution mechanism. In cases where there is a tie, both houses jointly choose the winner. In "contested elections," both houses of the legislature form a joint committee to resolve the dispute.

As with Delaware, the Pennsylvania Constitutions of 1776 and 1790 provided obvious textual models that the Framers of the original Constitution or of the Twelfth Amendment could have adopted to provide the methods of selecting the President or of resolving disputes over electors. Pennsylvania's 1776 constitution would have been

286. PA. CONST. § 19 (1776), *in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3087 (Francis Newtown Thorpe ed., 1909) [hereinafter 5 FEDERAL AND STATE CONSTITUTIONS].

287. *See id.*

288. PA. CONST. art. II, § 2 (1790), *in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 286, at 3095.

289. *Id.* at 572–73.

familiar to the Framers in 1787. Pennsylvania was known as the Keystone State not just because of its geographic importance in a nation composed of states hugging the Atlantic Ocean, but also because it was the second largest state by population, the largest in the free North, and one of the richest.²⁹⁰ James Wilson, the leading delegate from Pennsylvania, was one of the most influential designers of the Presidency.²⁹¹ Under its revolutionary-era constitution, Pennsylvania had fragmented the executive power: it gave the executive functions to a council of state and a President chosen by legislative ballot for only an annual term.²⁹² The drafters of the federal Constitution were well aware of Pennsylvania's treatment of the executive power; they consciously designed the Presidency as a reaction against it.²⁹³ The framers of the Twelfth Amendment would also have been aware of the state constitution's change in 1790 to explicitly include a mechanism to referee disputes over the vote for governor. Not only had the Federal Convention of 1787 occurred in Philadelphia, but the new national government made Philadelphia its home from 1791 until 1800—the very year of the election that prompted the amendment.²⁹⁴ If the framers had wanted to vest the authority to resolve disputed presidential elections in a legislative committee or Congress itself, they had models readily available to pull from the bookshelf. But they chose silence instead.

While not as closely on point, other state constitutions indirectly support this reading of the silence of the Twelfth Amendment. In their initial revolutionary constitutions, many states had vested the choice of the governor in the legislature.²⁹⁵ There would have been little need to identify a special method for resolving disputes, as such conflicts could undergo the same procedures that applied to other legislative acts. Nevertheless, some states included textual changes when they

290. U.S. CENSUS BUREAU, 1990 CPH-2-1, 1990 CENSUS OF POPULATION & HOUS. 27 tbl. 16, <https://www2.census.gov/library/publications/decennial/1990/cph-2/cph-2-1-1.pdf> [<https://perma.cc/C7DJ-AXD4>]; William E. Nelson, *Government by Judiciary: The Growth of Judicial Power in Colonial Pennsylvania*, 56 SMU L. REV. 3, 38 (2006).

291. Michael W. McConnell, *James Wilson's Contributions to the Construction of Article II*, 17 GEO. J.L. & PUB. POL'Y 23, 50 (2019); Carl H. Esbeck, *Religion and the First Amendment: Some Causes of the Recent Confusion*, 42 WM. & MARY L. REV. 883, 885 n.3 (2001).

292. PA. CONST. §§ 3, 19 (1776), *in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 286, at 3084, 3087.

293. WOOD, *supra* note 233, at 39–40.

294. Derek A. Webb, *The Original Meaning of Civility: Democratic Deliberation at the Philadelphia Constitutional Convention*, 64 S.C. L. REV. 183, 187 (2012); Lorianne Updike Toler, J. Carl Cecere & Don Willett, *Pre-“Originalism,”* 36 HARV. J.L. & PUB. POL'Y 277, 306 (2013); *see infra* Part III.B.5.

295. T. Quinn Yeagain, *Democratizing Gubernatorial Selection*, 14 NE. U. L. REV. 1, 9 (2022).

wished to adopt a method that went beyond simple legislative action, such as the creation of a committee to count or review the votes for the executive. Maryland's 1776 constitution provided, for example, that the assembly would select a governor, and that "the boxes [of ballots were] to be examined by a joint committee of both Houses, and the numbers severally reported."²⁹⁶

States that adopted popular election of the governor displayed more concern for the delicacy of executive selection. They adopted systems that presaged Article II of the federal Constitution. As the first state to rely on popular election of the executive, New York provides an important example.²⁹⁷ Its 1777 constitution tersely provided only that the people would choose a governor every three years, with no specific regulation of the conduct of the election itself.²⁹⁸ To implement this provision, the New York legislature eventually enacted a law in 1787 that created "a joint Committee" to "canvass and estimate the votes for Governor."²⁹⁹ The state assembly and senate would each appoint half of the committee, which had the duty to open the boxes of votes and count them.³⁰⁰ New York gave the joint committee the power to resolve disputes over the validity of the votes and the count. "[A]ll questions which shall arise upon such canvass and estimate, or upon any of the proceedings therein, shall be determined according to the opinion of the major part of the persons so met"³⁰¹ New York further excluded the possibility of review. "[T]heir judgment and determination shall, in all cases, be binding and conclusive."³⁰² As with the post-1789 changes to the Delaware and Pennsylvania constitutions, New York adopted a system that explicitly created a procedure for resolving disputed elections, which further reinforces our view that the Framers of the original 1789 Constitution and of the Twelfth Amendment had ready models at hand had they wanted to create a legislative mechanism to address contested electoral votes for President.

296. MD. CONST. art. XXV (1776).

297. D. Gregory Sanford & Paul Gillies, *And if There Be No Choice Made: A Meditation on Section 47 of the Vermont Constitution*, 27 VT. L. REV. 783, 786 (2003).

298. N.Y. CONST. art. XVII (1777).

299. THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788–1790, at 365 (Gordon DenBoer & Lucy Trumbull Brown eds., 1986) (quoting LAWS OF THE STATE OF NEW-YORK, PASSED BY THE LEGISLATURE AT THEIR TENTH SESSION 377 (1787)).

300. *Id.* (providing that the state assembly and senate would appoint committee members from their own bodies).

301. An Act for Electing Representatives for This State in the House of Representatives of the Congress of the United States of America, ch. LXII (New York, Mar. 28, 1797).

302. N.Y. CONST. pmbl. (1777).

To be sure, New York created this system through legislation rather than constitutional text, though that distinction has less force due to the establishment of the revolutionary constitutions by legislatures, often under wartime conditions. New York's statute stands as a model that the Framers of the original federal Constitution and of the Twelfth Amendment did not incorporate into the Constitution.

The other states to establish popular election of the governor similarly assumed legislative intervention into disputed elections. Massachusetts' 1780 constitution provided for popular election of the governor. It required that "the secretary [of state] shall lay the [vote tallies] before the senate and the house of representatives on the [last Wednesday in May], to be by them examined."³⁰³ The state senate and house would "declare[] and publish[]" the winner of a majority vote, but if no one won, the election would go to the legislature.³⁰⁴ New Hampshire's 1784 constitution adopted a similar procedure, in which the secretary of state would present the votes before the state senate and house, "to be by them examined." Thereafter the two Houses would declare and publish whether a candidate had won a majority.³⁰⁵ Both Massachusetts and New Hampshire created systems that put the votes before the legislature and called upon them to declare whether a majority of the voters had picked a winner. The Framers of the federal Constitution could have adopted a similar system, but instead employed language in the passive voice that did not identify the House and Senate as the body that would declare the winner. While these provisions provide less conclusive evidence, they reinforce the inferences we draw from the Delaware and Pennsylvania constitutions that the Framers declined to adopt a process that granted Congress the authority to resolve disputes over electoral votes.

D. The Unconstitutionality of the Electoral Count Act

Our review of the constitutional text and structure indicate that Congress cannot regulate the counting of the electoral votes. It follows that the current statutory dispute resolution procedure—the ECA—is unconstitutional. Two reasons stand out for denying that Congress has the power to ordain the dispute resolution process. We shall outline each of them briefly below, and then analyze each in more detail.

First, the Constitution provides no grant of pertinent authority to Congress. Neither Article II nor the Twelfth Amendment explicitly grants the House and Senate any authority over the counting of the electoral votes. The constitutional text grants the only affirmative role to the Vice President. ("The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the

303. MASS. CONST. ch. II, § I, art. III (1780).

304. *Id.*

305. N.H. CONST. pt. II (1784).

certificates and the votes shall then be counted.”³⁰⁶ In fact, the Twelfth Amendment not only declines to give the House and Senate any affirmative role in the counting of the votes, it does not mention the Congress at all in that process, except to confer on it the role of spectator.³⁰⁷ Indeed, the original placement of the procedures regulating the electoral count in Article II rather than in Article I strongly suggests that the functions described there are *executive* rather than legislative in nature—and therefore ought to be performed by the Vice President (or, possibly, by the Vice President concurrently with the two assembled houses) rather than by Congress acting as an Article I lawmaking body. In short, the Constitution’s failure to affirm any congressional authority is more than a mere oversight or unconsidered omission; it signals an absence of authority for Congress to decide disputes.

Second, Congress has no constitutional power to dictate to other constitutional actors—here, most relevantly, the Vice President—how they are to discharge the functions that the Constitution assigns to them. The ECA itself cannot constitutionally dictate how the Vice President, in the presence of the House and Senate, chooses to perform his duty under the Twelfth Amendment. Under standard separation-of-powers law, Congress may not impermissibly interfere with another constitutional actor’s performance of his functions, nor may it arrogate the performance of those functions to itself.³⁰⁸

Let us next spell out each of these two objections in more detail.

First, the Twelfth Amendment’s silence on dispute resolution stands in sharp contrast with the careful description of the role of each house elsewhere in the Constitution. Consider Article I, Section 7’s “finely wrought and exhaustively considered[] procedure”³⁰⁹ for the passage of bills, the President’s veto, the exact votes necessary to override, and even how the votes are to be recorded. Or take Article I, Section 8’s detailed enumeration of the powers vested in Congress.³¹⁰ The constitutional text also carefully describes the role of each house and the votes required to approve treaties, consent to nominees,

306. U.S. CONST. art. II, § 1, cl. 3.

307. *Id.* amend. XII.

308. For a full statement of the doctrine, see *Loving v. United States*, 517 U.S. 748, 757 (1996) (“Although separation of powers ‘d[oes] not mean that these [three] departments ought to have no partial agency in, or no contro[l] over the acts of each other’ . . . one branch of the Government may not intrude upon the central prerogatives of another. . . . Even when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.”) (citing *Mistretta v. United States*, 488 U.S. 361, 380–81 (1989)).

309. *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983).

310. U.S. CONST. art. I, § 8.

impeach and try impeachments, and propose constitutional amendments.³¹¹

Or consider the text of the Twelfth Amendment alone. If the electoral count fails to yield a majority for a single candidate, the amendment specifically states that “the House of Representatives shall choose immediately, by ballot, the President.”³¹² When the electoral count fails to yield a Vice President, the Twelfth Amendment simply declares that “the Senate shall choose the Vice-President” from the top two candidates.³¹³ We should not read a constitutional amendment’s silence to vest a power in the House and Senate, when exactly the same provision specifically gives them a role when it wants to do so.

Second, reading the Twelfth Amendment to give Congress the right to resolve disputes over electoral votes does not just create textual problems; it also strains the constitutional structure. Insofar as the ECA authorizes Congress to determine the electoral vote count, Congress has used its legislative power to control the function of another constitutional actor—the Vice President. But Congress cannot use a statute, which involves bicameralism and presentment, to govern the operation of other parts of the federal government in the performance of their exclusive constitutional responsibilities.

Congress, for example, cannot directly regulate the manner in which the President fulfills his or her responsibility to “take Care that the Laws be faithfully executed.”³¹⁴ As the Supreme Court made clear in 2020, Congress cannot prevent the President from removing principal executive officers who assist him in the execution of the laws.³¹⁵ Nor can Congress instruct the President whom to nominate to a principal federal office or a federal judgeship.³¹⁶ Congress also could not pass a statute instructing the Senate how to hold an impeachment trial,³¹⁷ nor could it dictate the process for Senate consideration of treaties or

311. U.S. CONST. art. II, § 2, cl. 2 (approving treaties and consenting to nominees); *id.* art. I, § 2, cl. 5 (impeaching); *id.* art. I, § 3, cl. 6 (trying impeachments); *id.* art. V (proposing constitutional amendments).

312. *Id.* amend. XII.

313. *Id.*

314. *Id.* art. II, § 3.

315. *Seila Law, L.L.C. v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211 (2020).

316. E. Garrett West, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 203–04 (2018) (“Congress may not compel the President to appoint or nominate someone.”); *see also* U.S. CONST. art. II, § 2, cl. 2.

317. *See Nixon v. United States*, 506 U.S. 224, 229 (1993) (“[T]he word ‘sole’ indicates that this authority [to try impeachments] is reposed in the Senate and nowhere else.”); *see also* U.S. CONST. art. I, § 3, cl. 6.

appointments.³¹⁸ Congress also cannot order the federal courts to hear cases beyond their jurisdiction or reopen their final judgments.³¹⁹ Indeed, *Marbury v. Madison*'s³²⁰ defense of the power of judicial review rests on the principle that Congress cannot instruct the judiciary on the performance of its unique constitutional duty to decide federal cases and controversies. To conclude otherwise would violate the separation of powers by allowing one branch of the federal government to interfere with another branch's execution of its core constitutional functions.³²¹

This central principle of the separation of powers requires rejection of the core of the ECA. Under the Twelfth Amendment, the electoral votes submitted by the states are to be unsealed, opened, and counted.³²² Logically, those functions could only be performed either by the presiding officer—the Vice President—or else by the entirety of both houses assembled together. But the latter operation would be cumbersome, if not impossible, for such a large body. In any case, the amendment specifies, without more, only that the two houses are to be present and observe.³²³ Hence performance of the functions in question necessarily falls to the Vice President—a different constitutional actor from Congress.³²⁴ But in the ECA, Congress has purported to prescribe, by legislation, how those functions are to be performed. It may not do that without violating separation of powers norms. The Vice President is carrying out electoral functions, which, although performed in the presence of the House and Senate, do not require (and are not subject to) the consent of either or both bodies. While the ECA might establish helpful deadlines for the state selection of presidential electors, the Act

318. *Id.* art. II, § 2, cl. 2; *see also* Joshua Kershner, *Political Party Restrictions and the Appointments Clause: The Federal Election Commission's Appointments Process Is Constitutional*, 32 CARDOZO L. REV. 615, 625–26 (2010) (“[T]he very act of passing a statute requires the involvement of the House of Representatives,” which “has no role in the process of nomination and appointment.”); Louis Fisher, *Congressional Participation in the Treaty Process*, 137 U. PA. L. REV. 1511, 1520 (1989) (“[T]he Constitution continues to exclude the House from the treaty process . . .”).

319. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995) (“[The statute] is unconstitutional to the extent that it requires federal courts to reopen final judgments entered before its enactment.”).

320. 5 U.S. (1 Cranch) 137 (1803).

321. *Id.* at 173–74, 176–77.

322. U.S. CONST. amend. XII.

323. *Id.* (“[T]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.”).

324. And even if it could be argued that the function of validating electors' votes falls to the states—or to the several electoral colleges in the states—those too are constitutional actors distinct from Congress.

cannot bind actors under the Twelfth Amendment as to their judgment of the validity of disputed votes.

That summarizes our two main arguments against the constitutionality of the ECA. How might a defender of the ECA's constitutionality respond?

The leading defense of the ECA's constitutionality appeals to the Necessary and Proper Clause of Article I.³²⁵ That defense contends that Congress can establish rules for the resolution of disputes over electors under its Necessary and Proper Clause power to carry into execution the Constitution's other powers of government. Defenders of the constitutionality of the ECA have argued so over time, including members of the Congresses that debated the Act and its precursors.³²⁶ Others have doubted, however, that the ECA is a valid exercise of Congress's power to enact legislation "necessary and proper" to its own functioning or to that of the President and Vice President.³²⁷

Let us parse the question closely. Article I, Section 8, Clause 18 (sometimes called the Sweeping Clause) states in part that Congress shall have the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."³²⁸

Arguments relying on the Sweeping Clause to sustain the ECA have come in at least three forms. One is that while the Vice President is presiding over the electoral vote count, he is an "officer" within the meaning of the Sweeping Clause, and hence subject to congressional regulation in the performance of the count he is charged with making.³²⁹ A second is that legislation like the ECA is "necessary and proper" to the effective functioning of the Presidency: unless there is a definitive guide to resolving electoral count disputes (which the Constitution

325. U.S. CONST. art. I, § 8, cl. 18.

326. *See, e.g.*, FOLEY, *supra* note 21, at 157; Albert J. Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1, 32, 35 (1968).

327. Ross & Josephson, *supra* note 96, at 714–15. Ross and Josephson make quick work of this defense of the ECA. In their view, the first part of the Sweeping Clause "relates to prior specific congressional legislative powers [enumerated in Article I], none of which are relevant," while the latter part of the clause "may relate only to powers conferred on the Executive or Judiciary or departments or officers thereof." *Id.* That may be true, but we think the defense merits fuller consideration.

328. U.S. CONST. art. I, § 8, cl. 18; *see also* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 270 & n.10 (1993) (explaining that the "Sweeping Clause" label adopted by the Framers originated with the Antifederalists of the Founding Era).

329. *E.g.*, John W. Burgess, *The Law of the Electoral Count*, 3 POL. SCI. Q. 633, 647 (1888).

assumedly does not provide), the office of the President might not be filled, and thus the executive branch could not function adequately or at all.³³⁰ Finally, a defender of the ECA might also argue that the statute represents the choices of the House and Senate, as “departments” of the government, as to how they should perform their Twelfth Amendment functions.³³¹

The first line of defense assumes that the Vice President, while presiding over the meeting of the houses at which the electoral vote count takes place, is an “Officer” of the United States, whose performance Congress may therefore regulate. In a valuable article published soon after the enactment of the ECA, the political scientist John W. Burgess took that position. Echoing the views of many congressional supporters of the legislation, Burgess wrote:

The framers of the constitution undoubtedly meant that the president of the Senate should count the electoral votes, but in making the count they did not . . . think of his ever being placed under the necessity of ascertaining what should be counted. They were, however, wise enough to know that they could not foresee all things, and therefore they wrote in the constitution that Congress should have power to make all laws necessary and proper to carry into execution all powers vested by the constitution in the government of the United States or in any department *or officer thereof*. A sound interpretation of this clause cannot fail to accord to the Congress the power to make laws for carrying into execution this general and undefined power of the president of the Senate to count the electoral votes.³³²

There are several problems with this analysis. For one, the assumption that the President of the Senate is an “officer” in the constitutional sense may well be incorrect. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,³³³ the Supreme Court stated that “[t]he people do not vote for the ‘Officers of the United States.’”³³⁴ “Officers of the United States” in the meaning of that clause are appointed exclusively pursuant to the procedures that the Appointments Clause delineates. The Vice President, who is an elected rather than appointed official, is therefore not an “Officer of the United States” under the Appointments Clause—or under *any other* clause, if

330. See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 137 (1997).

331. See Kesavan, *supra* note 26, at 1731–32 (arguing that Congress is not a “Department” under the Necessary and Proper Clause).

332. Burgess, *supra* note 329, at 647.

333. 561 U.S. 477 (2010).

334. *Id.* at 497–98 (describing the President’s power under Article II, Section 2, Clause 2 to appoint “Officers of the United States”).

the Constitution's use of the term is understood to be consistent throughout. Furthermore, in designating who is subject to impeachment and removal, Article II, Section 4, Clause 1 *distinguishes* the President and Vice President from "all civil Officers of the United States." And Section 2 of the Twenty-Fifth Amendment provides for the confirmation of a successor Vice President by *both* houses of Congress, rather than by the Senate alone (as is the case for principal "officers").

Moreover, the power to "count" votes hardly seems to be "general and undefined," as Burgess put it.³³⁵ Burgess describes "the power of ascertaining what is to be counted" as the "most important element" of the "power of counting."³³⁶ To strip the Vice President of the "most important element" of the power of counting that the Constitution assigns exclusively to him or her would be an abuse of whatever authority Congress might have to regulate the Vice President's conduct in this context. Consider an analogy: the Constitution vests in the President the sole power to veto bills that Congress presents to him (subject to an override). The veto is an exercise of a constitutional power assigned solely to the President. Could Congress, under the Sweeping Clause, direct the President how to discharge that function? Obviously not—to think so would be to eviscerate the veto power. Likewise, Congress cannot dictate to the President whom he may or may not pardon: the pardon power is exclusively executive. So here: the counting function uniquely conferred on the Vice President cannot be either undermined or usurped by Congress.³³⁷

The ECA's second line of defense argues that Congress has the power under the Sweeping Clause to enact the ECA because such a statute is "necessary and proper" for the functioning of the Presidency. For if a dispute over the electoral vote count could not be resolved, there would be no (recognized) President at all: the office would be left vacant (or its rightful possessor would be disputed, with no resolution in sight). And if there were no one to hold the office of President, the powers of the Presidency could not be exercised at all.³³⁸

335. Burgess, *supra* note 329, at 647.

336. *Id.* at 637.

337. Indeed, we note that the Sweeping Clause does not even vest Congress with authority to govern all the powers *granted in Article I itself*. See U.S. CONST. art. I, § 8, cl. 18 (granting Congress authority to make laws necessary and proper "for carrying into Execution the foregoing Powers, and all other Powers vested" in the federal government). For Article I, Section 3, Clause 4 gives the Vice President the power to cast the deciding vote when the Senate is equally divided. *Id.* art. I, § 3, cl. 4. And plainly, Congress cannot direct the Vice President how to exercise *that* power.

338. Some judicial support for this approach might be eked out from Justice Sutherland's opinion for the Court in *Burroughs v. United States*:

Again, however, the argument appears to be flawed. For one thing, the ECA (or a similar statute) would *not* be “necessary” if a constitutional procedure for resolving such disputes were in existence. If, as we contend, there *is* such a procedure—that the decision-making authority is vested in the Vice President—then legislation like the ECA is simply not “necessary.”

Moreover, this line of argument would threaten to transform the Presidency into a mere creature of Congress, in violation of separation of powers principles. If the Sweeping Clause enabled Congress to define the rules of counting the votes of presidential electors because otherwise there might be no functioning Presidency at all, then Congress would seem to have the further power to provide for the appointment of independent prosecutors, not removable by a higher executive official or subject to the supervision and control of one, in order to oversee the President’s performance of his or her duties.³³⁹ Congress could also, by statute, regulate independent executive powers, such as vetoes, pardons, and the recognition of foreign governments, all in the name of promoting the sound functioning of the Presidency.

Finally, in a third line of defense, an ECA defender might argue that Congress itself is a “Department” of the federal government under the Necessary and Proper Clause, and accordingly that Congress may prescribe, by statute, how it is to execute its functions under the Twelfth Amendment. But even on the dubious assumption that

While presidential electors are not officers or agents of the federal government (*In re Green*, 134 U.S. 377, 379), they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.

290 U.S. 534, 545 (1934). It is unclear whether Justice Sutherland is invoking a constitutionally unenumerated power of “self-protection” inherent in national sovereignty, referring to the Sweeping Clause, or both.

339. See *Morrison v. Olson*, 487 U.S. 654, 704–06, 708–09 (1988) (Scalia, J., dissenting); *Seila Law L.L.C. v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020). *Seila Law* largely vindicates Justice Scalia’s dissent in *Morrison* and limits the majority opinion in that case.

Congress is a “Department,”³⁴⁰ the argument fails. Most importantly, the Twelfth Amendment ascribes no relevant “Power[]” to Congress for whose “Execution” Congress may provide by “Law[].” As we have noted, the only role given to Congress in this phase of the electoral process is that of being present to witness.

A special problem for the defense of the ECA’s constitutionality under the Sweeping Clause is that the body that gathers for the electoral vote count under the Twelfth Amendment could arguably be viewed as a constitutionally unique entity (just as the electoral colleges that meet in the several states are themselves constitutionally unique).³⁴¹ Therefore, even if “Congress” in its lawmaking capacity were to be considered a “Department” under the Sweeping Clause, this distinct body would not be “Congress,” when the latter is considered a bicameral, lawmaking body acting under Article I.

The Twelfth Amendment arguably creates a separate and unique body of the federal government: a *sui generis* body over which the Vice President presides that is convened solely for the opening and counting of electoral ballots.³⁴² This assembly does not involve the House and Senate acting in a legislative capacity—as “Congress”—where it might

340. This seems unlikely. The reference to “executive Departments” in the Opinions Clause plainly seems to concern heads of cabinet departments and other federal agencies. *See* U.S. CONST. art. II, § 2, cl. 1. So too does the reference to “executive departments” in Section 4 of the Twenty-Fifth Amendment. *See id.* amend. XXV, § 4.

341. Alternatively, the gathering in question might be considered a joint session of Congress, such as happens when the Senate joins with the House to hear a presidential State of the Union address. The joint session is also not a “Department,” even if *Congress as a lawmaking entity* were deemed to be so.

342. This view was advanced in 1880 by Senator John Tyler Morgan. Morgan referred to the joint session as the “election tribunal” and noted its constitutional peculiarity:

It is not a congress met together; it is not a joint assemblage of the two Houses in which there is any general power to be exercised by them in the presence of each other, but it is the meeting of two distinct constitutional bodies entrusted with a distinct constitutional jurisdiction. The very essence of the jurisdiction that they can exercise implies necessarily that they must have the full and unlimited power of deciding according to their own enlightened discretion and judgment as to what is proper to be done under the Constitution and laws of the United States.

Nathan L. Colvin & Edward B. Foley, *Lost Opportunity: Learning the Wrong Lesson from the Hayes-Tilden Dispute*, 79 *FORDHAM L. REV.* 1043, 1065 (2010) (quoting 10 Cong. Rec. at 3659). *Contra* Land & Schultz, *supra* note 26, at 344, 346–48 (arguing that the body assembled to observe the counting of the votes is *not* “a unique constitutional entity”).

(conceivably) have been amenable to statutory regulation.³⁴³ In support of the characterization of this assembly as a distinct constitutional actor, one might note that the assembly mirrors the combination of the various state electoral colleges in a particular way: excluding the Vice President, the numbers are exactly the same, since the sum total of the electors eligible to vote must constitutionally equal the sum total of senators and representatives eligible to attend. Moreover, just as the various electoral colleges are, so to say, one-trick ponies (they are formed only to cast electoral votes, seal them and certify them, and then dissolve after that), so too is this unique and ad hoc assembly. One might then speculate that the Founders intended this unusual body to have a substantive role of some sort in the electoral vote count.

Can the Sweeping Clause be construed to give Congress, as a lawmaking body, the power to regulate this (arguably) unique constitutional actor? And would the ECA be constitutional if viewed as an exercise of such power? We doubt it. For even if the Constitution created such a unique entity, it is silent as to who would have the authority to regulate its actions. The Sweeping Clause does not cover this actor; it pertains in relevant part to Congress's power to provide for carrying into execution *the powers of the other two branches* of the federal government. Rather, the assembly would seem to be self-regulating—to have the inherent power to adopt whatever internal procedures it chose. And if it were self-regulating, not only would Congress have no power to ordain its procedures under the ECA or otherwise, but no single session of the assembly would have the power to bind its successors to follow certain procedures: whatever internal procedural rules a particular assembly decided to adopt, a later one would be free to discard or revise.

We conclude, therefore, that the House and Senate have no substantive role in the selection of the President except when the Electoral College fails to produce a result. We believe that this conclusion is further supported by practice contemporaneous with the drafting and ratification of the Twelfth Amendment. It is to that history that we now turn.

343. On the other hand, if the assembly (like the state electoral colleges) *is* a constitutionally unique entity, then it arguably has the inherent power to fashion *its own* procedural rules, without being subject to regulation by federal statute. *Watkins v. United States*, 354 U.S. 178, 187–88 (1957) (explaining that congressional subpoena authority and the associated contempt process are inherent powers, the latter of which is also recognized in British parliamentary practice); *cf.* *Heckers v. Fowler*, 69 U.S. 123, 128 (1864) (“Circuit Courts, as well as all other Federal courts, have authority to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States.”). Thus, on the first day of the Constitutional Convention, May 25, 1787, the delegates appointed a committee to propose rules of procedure for the Convention—an exercise of an inherent power. *See* 1 FARRAND’S RECORDS, *supra* note 237, at 2.

III. FOUNDING ERA PRACTICE AND AFTER

So far, we have argued that the constitutional text denies Congress any substantive role in selecting the President. The Twelfth Amendment's text provides the only exception—when the Electoral College fails, the House chooses the President via state-delegation votes. This conscious exception policy resolves electoral vote disputes. In the absence of an explicit constitutional command to transfer that power to Congress, the more natural reading of the Twelfth Amendment is that the Vice President's role in opening the votes extends to deciding which ones are legitimate. In this Part, we review the few moments when this question has arisen and how they should inform interpretation of the Twelfth Amendment.

A. Interpretative Guidelines: The Uses of History

Two canonical interpretative principles guide our analysis. First, the Constitution should be read in light of the political branches' practical constructions. In interpreting the Constitution, the Supreme Court has emphasized the political branches' decisions, especially established historical practice. As Chief Justice Marshall wrote in *McCulloch v. Maryland*.³⁴⁴

[A] doubtful question, one on which . . . the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that [long-standing] practice.³⁴⁵

Likewise, in *The Pocket Veto Case*,³⁴⁶ the Court stated that “[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character.”³⁴⁷ And, in 2020, the Supreme Court in an elector case reaffirmed the importance of this interpretative rule with the observation that “[a]s James Madison wrote, ‘a regular course of practice’ can ‘liquidate & settle the meaning of’ disputed or indeterminate ‘terms and phrases.’”³⁴⁸

Second, the Founding Era's constitutional thought carries a particular weight in interpretation, especially the practices of the

344. 17 U.S. (4 Wheat.) 316 (1819).

345. *Id.* at 401.

346. 279 U.S. 655 (1929).

347. *Id.* at 689.

348. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) (quoting James Madison's 1819 letter to Spencer Roane); *see also* *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2085 (2015) (determining that the President has the power to recognize states and governments partly because of the Reception Clause based on the meaning of language at the Founding).

political branches in the near aftermath of the ratification of the Constitution and the Bill of Rights. The Court has often recognized that it is reasonable to give significant weight to the understanding of the Constitution that is reflected in the thoughts and actions of those who framed and ratified it.³⁴⁹ For example, in upholding the President's removal power over inferior executive officers in 2020, the Court found determinative the historical evidence from the first federal Congress.³⁵⁰ Of course, this is not to say that the decisions of the political branches in the Founding Era are an infallible guide.³⁵¹ But early practices should receive great weight, as they reflect the views of the American leaders who drafted and ratified the Constitution and the original ten amendments.

Governmental practices, particularly those from the early Republic, are relevant in construing the Twelfth Amendment. That is because the question is not about the meaning of the constitutional text but about the implications of silence for the question of resolving disputes over electoral votes. As Justice Joseph Story explained:

In the original plan, as well as in the [Twelfth] amendment, no provision is made for the discussion or decision of any questions, which may arise, as to the regularity and authenticity of the returns of the electoral votes, or the right of persons, who gave the votes, or the manner, or circumstances, in which they ought to be counted. It seems to have been taken for granted, that no question could ever arise on the subject; and that nothing more was necessary, than to open the certificates, which were produced, in the presence of both houses, and to count the names and numbers, as returned.³⁵²

As we explain later, Justice Story mistakenly implied that the framers of the Twelfth Amendment in 1804 (distinct from the Framers in 1787) were unaware of potential problems involving electoral votes.³⁵³ Such problems had already surfaced in the elections of 1796 and 1800

349. *See, e.g.*, *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (“[T]he precedential value of these cases [in which Congress excluded a member-elect although he met constitutional qualifications] tends to increase in proportion to their proximity to the Convention in 1787.”); *Marsh v. Chambers*, 463 U.S. 783, 786–91 (1983); *Carroll v. United States*, 267 U.S. 132, 150–52 (1925).

350. *Seila Law L.L.C. v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191–92, 2197 (2020).

351. *See, e.g.*, Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 114–17, 120, 124–27, 132–33 (1995).

352. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1464, at 327 (1833).

353. *See infra* notes 399–400 and accompanying text.

and had been debated in Congress and throughout the nation.³⁵⁴ Nonetheless, Story may have been right about the assumptions behind what he called the 1787 Constitution's "original plan."³⁵⁵ In any case, the Constitution's ambiguity on these matters invites recourse to the interpretative guidelines we have outlined. Accordingly, we turn to the historical background and practice relating to the Twelfth Amendment.

B. Practice in the Founding Period

American history has witnessed relatively few presidential and even fewer vice-presidential elections where the legitimacy of electoral votes was subject to major challenges.³⁵⁶ But when this has occurred, those challenges could prompt significant reforms. For example, the 1800 election led to the adoption of the Twelfth Amendment in 1804. The 1876 election resulted in the eventual passage of the ECA of 1887. The election of 2020 has prompted 2022 amendments to the ECA. Nevertheless, the practice of the political branches with regard to electoral disputes has been episodic and intermittent, which renders Founding Era practice even more important. Practice leads to the conclusion that, from 1789 to 1821, "the power to count and/or determine the validity of [the electors'] votes" was "generally thought vested in the states or in the President of the Senate."³⁵⁷

354. "Congress was well aware of these problems as early as 1800," even before the election of that year, and four years before the Twelfth Amendment. Nathan L. Colvin & Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. MIAMI L. REV. 475, 485–87 (2010).

355. Kesavan, *supra* note 26, at 1658 n.9, 1666. Of note, the Philadelphia Convention had considered, but rejected, a draft of Article II, Section 1, Clause 4 that would have provided in express terms that the state legislatures might determine "the manner of certifying and transmitting their [electoral] votes." *Id.* (quoting 2 FARRAND'S RECORDS, *supra* note 237, at 529). The rejection of this language might be taken to indicate that the Framers believed that the legislatures' power to certify and transmit their electors' votes was subsumed within their power to control "the manner" of their appointment. In any case, it suggests some awareness that problems might arise in determining the vote count.

356. Even so, "[d]isputes concerning presidential electors and their votes are more common than one may think." Harrison, *supra* note 26, at 699.

357. See Colvin & Foley, *supra* note 354, at 480; see also DAVID A. MCKNIGHT, THE ELECTORAL SYSTEM OF THE UNITED STATES 17 (1993) ("From the time of the first Congress in 1789 to the year 1821, history shows that the unquestioned custom was for the President of the Senate to 'declare' the votes officially, whilst Counting was, *what* the language of the law would seem to convey clearly enough, simply 'enumeration.'" (emphasis added)). This practice prevailed for as long as some of the Framers were members of Congress. See MCKNIGHT, *supra*, at 17.

1. The Election of 1788

The original Constitution provided that, after the states had transmitted their electoral votes “to the Seat of the Government of the United States, directed to the President of the Senate,” the Vice President was to “open all the Certificates, and the Votes shall then be counted.”³⁵⁸ It was obviously impossible to conform to that procedure in the first presidential election of 1788, when no President of the (first) Senate was in office. As such, a unanimous resolution by the Philadelphia Convention advised that, in the first election, “the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President.”³⁵⁹ In adherence to that recommendation, Senator John Langdon, a Framers and ratifier of the original Constitution,³⁶⁰ was elected the President of the Senate on April 6, 1789, “for the sole purpose of opening and counting the votes for President of the United States.”³⁶¹ “Both houses of Congress appointed members to ‘sit at the Clerk’s table to make a list of the votes as they shall be declared.’”³⁶² These actions make it clear that the Framers thought that the counting function was vested in the President of the Senate alone.³⁶³

To be sure, this very early occasion, though related to the formation of the federal government and the selection of the first President, does not in itself control the meaning of Article II’s presidential electors clause or of the Twelfth Amendment. Nonetheless, it demonstrates with whom the Framers intended to vest the function of counting electoral votes after their submission to Congress. The unanimous desire to charge exclusively the (temporary) President of the Senate with the counting function in the first election is important because the Framers sought to model the actual workings of the Constitution through their

358. U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. CONST. amend. XII.

359. 2 FARRAND’S RECORDS at 666; *see also* 1 ANNALS OF CONG. 17 (1789) (Joseph Gales ed., 1834).

360. *Langdon, John*, CONGRESS.GOV: BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–PRESENT, <https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=1000067> [<https://perma.cc/GRU7-VU9A>] (last visited Nov. 26, 2022).

361. 1 ANNALS OF CONG., *supra* note 359, at 16–17.

362. Colvin & Foley, *supra* note 354, at 483 (quoting SPECIAL COMMITTEE ON COUNTING ELECTORAL VOTES, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 8 (1877)).

363. *See id.* at 480–81 (“Early on, the President of the Senate would be called upon to make some judgments as presiding officer, and this might suggest that the Framers and their contemporaries thought the proper exercise of power belonged in the hands of this single individual.”); *see also* Burgess, *supra* note 329, at 647 (“The framers of the constitution undoubtedly meant that the president of the Senate should count the electoral votes . . .”).

practices. They understood that text alone could not comprehensively guide the Constitution's operation and that examples would help resolve inevitable uncertainties.³⁶⁴ This was especially true with questions concerning presidential elections.

2. The Act of March 1, 1792

On March 1, 1792, the Second Congress enacted a statute entitled "An Act relative to the Election of a President and Vice President of the United States and declaring the Officer who shall act as President in case of Vacancies in the offices both of President and Vice President."³⁶⁵ Section 5 of that act concerned the procedures to be followed in future presidential elections for counting the electoral votes that had been certified by and received from the States:

SEC. 5. And be it further enacted, That Congress shall be in session on the second Wednesday in February, one thousand seven hundred and ninety-three, and on the second Wednesday in February succeeding every meeting of the electors, and the said certificates, or so many of them as shall have been received, shall then be opened, the votes counted, and the persons who shall fill the offices of President and Vice President ascertained and declared, agreeably to the constitution.³⁶⁶

This language is important for two reasons. First, the 1792 statute closely mirrors the relevant language of Article II, Section 1. In both texts, the passive voice is used in describing the counting procedure. The Twelfth Amendment is likewise couched in the passive voice. The 1792 statute states that "the said certificates, or so many of them as shall have been received, shall then be opened, *and the votes counted.*" The corresponding language of the Twelfth Amendment states that "the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates *and the votes shall then be counted.*"³⁶⁷ The resemblance between the three texts is unmistakable. The 1792 statute, along with the original Presidential

364. *E.g.*, AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 309 (2012) (discussing how the Founders in government "act[ed] out" the Constitution's text); Glenn A. Phelps, *George Washington and the Founding of the Presidency*, 17 *PRES. STUD. Q.* 345, 361 (1987) ("The Federal Constitution was not completed in 1787 at the Philadelphia Convention, or even in 1788 with ratification by eleven states. In truth the Founding process was continued throughout the early years of the new national government by those who fleshed out its ambiguities in the light of their experiences.").

365. Act of Mar. 1, 1792, ch. 8, 1 Stat. 239.

366. *Id.* § 5 (emphasis omitted).

367. U.S. CONST. amend XII (emphasis added).

Electors Clause in Article II, must have provided the templates for the relevant part of the Twelfth Amendment.

Second, Clause 3 of Article II, Section 1 and the 1792 act controlled all three elections that occurred between the statute's enactment in 1792 and the Twelfth Amendment's adoption before the election of 1804. And two of those elections—in 1796 and in 1800—involved substantial questions regarding who had the authority to count the electors' votes. In both elections, the Vice President—John Adams in 1796, Thomas Jefferson in 1800—allegedly counted “improper” votes without challenge from congressmen witnessing the vote count per Article II (still unamended at that time).³⁶⁸ Both Adams and Jefferson appear to have assumed that Article II and the 1792 statute vested at least some authority to count the votes in them, as Vice Presidents and Presidents of the Senate.

Adams's and Jefferson's understanding of their constitutional and statutory powers was reflected in the Twelfth Amendment and so should inform its interpretation.³⁶⁹ The framers and ratifiers of the amendment would have known the two's actions and must have acquiesced in them. Certainly, nothing in the amendment's language disturbs the prior practice.

3. The Election of 1792

George Washington's reelection in 1792 required both congressional houses to convene under the Vice President (John Adams) for the opening and counting of the ballots. The procedure was essentially the same as in 1789.³⁷⁰ A committee formed by Congress “declared that each house should appoint a ‘teller’ to make a list of the votes as declared and deliver the results to the President of the Senate.”³⁷¹ Then, “the certificates of the electors . . . were, by the Vice-President, opened, read, and delivered to the tellers appointed for the purpose, who, having examined and ascertained the votes, presented a list of them to the Vice-President.”³⁷² The role of the tellers, like that of the congressmen seated at the clerk's table in 1789, seems to have been

368. See Kesavan, *supra* note 26, at 1706–07.

369. See *id.* at 1707–08 (“The Twelfth Amendment, adopted in 1804, did not resolve the textual ambiguity between the two readings of the counting function. In fact, it contains language identical to that found in Article II, Section 1, Clause 3. . . . [E]arly commentators on the Constitution, such as Chancellor James Kent and Professor William Duer, writing in the wake of the Twelfth Amendment, thought that the counting function still belonged to the President of the Senate.”).

370. Colvin & Foley, *supra* note 354, at 484.

371. *Id.*

372. *Id.* (quoting H.R. Misc. Doc. No. 44-13 at 10).

entirely ministerial (keeping a running tally and presenting the final count to the Vice President).³⁷³

4. The Election of 1796

This was the first presidential election after George Washington's retirement. The chief contestants were John Adams and Thomas Jefferson, both eminent Founders. The choice between the two hinged on the votes of four electors from Vermont, who received considerable attention from the media.³⁷⁴ Contemporaneous sources indicate that Vermont may not have appointed its electors properly, because the state used a legislative resolution rather than a statute and missed the deadline set by a 1792 congressional act.³⁷⁵ If the Vermont electors had not been validly appointed, Adams would lose the state's four votes and Jefferson would become President by a margin of sixty-eight to sixty-seven.³⁷⁶ Writing to Thomas Jefferson on December 25, 1796, James Madison told him that “[u]nless the Vermont election . . . should

373. Seligman, *supra* note 134, at 17–18, takes a very different view of the functions and powers of the “tellers,” focusing on the 1796 election. Seligman observes that for the 1796 electoral vote count, each house adopted a resolution under which that house was to appoint two tellers. *Id.* at 17 (quoting the resolution in full). Seligman interprets the appointment of these tellers as evincing “congressional control of the counting of the electoral votes.” *Id.* at 18. But there is nothing in the language of the resolution that implies that the tellers were charged with performing anything other than ministerial functions: the resolution says that the tellers are “to make a list of the votes as they shall be declared” and then “deliver[]” “the result” to the President of the Senate. 6 ANNALS OF CONG. 2063–64 (Feb. 3, 1797). We would understand this language to mean that the tellers were to read aloud (“shall be declared”) and keep a running tally of (“list”) the votes from each state, and then hand over (“deliver”) their final tally (“the result”) to the Vice President. Seligman overreads this language to mean that Congress was charging the tellers with the discretionary function of judging the validity of the electors' ballots; nor do we know of any evidence that Congress thought it was doing anything so consequential. If Congress had intended to confer such discretionary authority, would it have referred to those who were to execute that task merely as “tellers”? And *could* Congress constitutionally delegate such authority—assuming it believed it had it—to four “tellers”?

374. Ackerman & Fontana, *supra* note 27, at 570–73, 571 nn.52 & 54, 611.

375. *Id.* at 570–73.

376. *Id.* at 570; Letter from James Madison to Thomas Jefferson (Dec. 25, 1796), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-16-02-0300> [<https://perma.cc/APE5-RTJY>] (last visited Nov. 27, 2022); Letter from James Madison to Thomas Jefferson (Jan. 8, 1797), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-29-02-0201> [<https://perma.cc/J5FM-E9TT>] (last visited Nov. 27, 2022).

contain some fatal vice, in it, Mr. Adams may be considered as the President elect.³⁷⁷

The counting took place on February 8, 1797. Vice President Adams, as President of the Senate, presided over the counting of the electoral vote.³⁷⁸ According to the *Annals of Congress*,³⁷⁹ Adams announced a vote count of seventy-one for himself and sixty-eight for Jefferson, giving Adams a majority of the 138 votes cast.³⁸⁰ “The President of the Senate then sat down for a moment.”³⁸¹ After that moment, Adams stood up and announced that he was elected President and Jefferson Vice President.³⁸²

Professors Bruce Ackerman and David Fontana have conjectured that Adams’s pause in 1797 reflected misgivings about his authority to count the Vermont electors.³⁸³ That conjecture is possible but by no means necessary. Indeed, other interpretations seem equally (if not more) plausible. One is that “perhaps Adams was only marking a transition between two phases of the proceeding, symbolizing that the vote count had concluded and the time had come for a final and authoritative declaration of the result.”³⁸⁴ Instead of creating an opening for Jeffersonians to object to his decision to count the Vermont votes, Adams, believing that his count was authoritative, may have been forestalling such objections by briefly taking his seat.³⁸⁵

Other explanations are also plausible. Maybe the Jeffersonians did not object because they believed that Congress had no constitutional role to play in the vote count other than as a witness. Or perhaps they remained silent because they thought objections were meritless. It is also possible that they did not want Washington’s immediate successor to begin his term under a cloud.³⁸⁶ And we can have no idea how Adams

377. Letter from James Madison to Thomas Jefferson (Dec. 25, 1796), *supra* note 376.

378. 6 ANNALS OF CONG. 2096 (1849).

379. *Id.* at 2096–98.

380. *Id.* at 2097–98 (“By the report which has been made to me [Adams] by the tellers appointed by the two Houses to examine the votes, there are 71 votes for John Adams, 68 for Thomas Jefferson The whole number of votes are 138; 70 votes, therefore, make a majority.”).

381. *Id.* at 2098.

382. *Id.*

383. Ackerman & Fontana, *supra* note 27, at 580–81 (“He would not have paused unless he harbored some doubts about his authority as President of the Senate to resolve disputed issues unilaterally.”).

384. *Id.* at 581.

385. Further, we note that Adams did not *call for* objections.

386. Jefferson himself wrote to James Madison that if a contest arose, he wanted Adams to be preferred. Letter from Thomas Jefferson to James

would have ruled if an objection had been made: he might have ruled it out of order.³⁸⁷

Or perhaps Adams's gesture (if it did occur) had no substantive significance. The *Journal of the Senate* for February 8, 1797, makes no mention of Adams's pausing or sitting:

The two Houses of Congress accordingly assembled in the Representatives' Chamber, and the certificates of the electors of sixteen states were, by the Vice President, opened and delivered to the tellers appointed for the purpose, who, having examined and ascertained the number of votes, presented a list thereof to the Vice President, which was read Whereupon, the Vice President addressed the two Houses of Congress [and declared himself elected as President].³⁸⁸

Likewise, the *Journal of the House* makes no such mention: "The President of the Senate, pursuant to the joint resolutions of the two Houses of the second and third instant, then announced the state of the votes to both Houses, and declared 'That John Adams, of Massachusetts, was duly elected President of the United States'"³⁸⁹ These records indicate that Adams's gesture may not have been important enough to be noted in either record.

What *is* important is that Adams, discharging his functions under Article II and the 1792 statute, seemingly assumed he had *some* authority to count the votes, including disputable ones from Vermont, and to announce the results to the joint session. It is possible, however, that Adams thought that he was bound to count the Vermont electoral votes because they were the *only* votes certified by that state. In other words, he might have believed that he had no authority to look past the certification he had received in order to identify possible irregularities. No congressman objected to the procedure, though the result was in Adams's favor. These facts must inform the proper reading of the Twelfth Amendment, as they occurred during the first presidential election during which parties competed and disputable electoral votes were involved.

Madison (Dec. 17, 1796), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-29-02-0182> [<https://perma.cc/HYZ4-LWX4>] (last visited Nov. 29, 2022); LOLABEL HOUSE, A STUDY OF THE TWELFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES 29 (1901).

387. Early Senate rules and practice seem to have given the President of the Senate significant authority for maintaining order in the upper chamber. MARK O. HATFIELD, U.S. SENATE HISTORICAL OFFICE, VICE PRESIDENTS OF THE UNITED STATES, 1789–1993, at xvi (Wendy Wolff ed., 1997).

388. S. JOURNAL, 4th Cong., 2d Sess. 320 (1820).

389. H.R. JOURNAL, 4th Cong., 2d Sess. 686 (1826).

5. The Election of 1800

In the months before the bitterly contested election, leaders of the Federalist Party, then in control of the Sixth Congress, sought to prevent Jefferson from winning by enacting a statute that would have given Congress a decisive role in evaluating the ballots.³⁹⁰ Federalist senator James Ross put forth a bill to create what was commonly referred to as the “Grand Committee.”³⁹¹ The bill would have conferred on a committee of thirteen the responsibility for deciding the legality or illegality of electoral votes in a disputed election. Of the thirteen, six were to be chosen by the House, six by the Senate, and one by the Chief Justice (or, in his absence, the most senior Justice).³⁹² The Grand Committee bill died because of the unexpected opposition of Federalist congressman and future Chief Justice John Marshall, who voiced objections regarding the constitutionality of the measure and lobbied hard against it.³⁹³ Subsequently, Marshall was appointed the chair of a committee that redrafted the bill.³⁹⁴ As reported out of the committee, the amended bill would have given the Grand Committee an advisory role. Upon receiving the Committee’s report regarding the validity of the electoral votes, Congress would make a final determination whether to include them or not. The bill died because the House and the Senate could not come to a conclusion.³⁹⁵

The episode is noteworthy for two reasons. First, it suggests that, even as early as 1800, some congressmen, including John Marshall, believed that Congress potentially had an affirmative role to play in deciding the validity of electoral ballots. Second, it reveals that there were significant constitutional objections to that idea. And those objections came from very knowledgeable sources.

Charles Pinckney, a Jeffersonian senator from South Carolina, voiced the chief constitutional objections. Pinckney was a distinguished Framers who had submitted his own plan for the Constitution to the Philadelphia Convention.³⁹⁶ In a lengthy and powerful speech before the

390. Kesavan, *supra* note 26, at 1669; Ackerman & Fontana, *supra* note 27, at 583–84.

391. Kesavan, *supra* note 26, at 1669–70; *see* Ackerman & Fontana, *supra* note 27, at 583–84.

392. Kesavan, *supra* note 26, at 1670. For fuller accounts of the episode, see *id.* at 1669–74; Ackerman & Fontana, *supra* note 27, at 583–84; and Colvin & Foley, *supra* note 354, at 486–88.

393. Kesavan, *supra* note 26, at 1672; Ackerman & Fontana, *supra* note 27, at 584.

394. Kesavan, *supra* note 26, at 1672–73.

395. *Id.* at 1673.

396. 1 FARRAND’S RECORDS, *supra* note 239, at 23; Charles Pinckney, *Charles Pinckney’s Plan*, in THE DOCUMENTARY HISTORY OF THE RATIFICATION

Senate, he recollected the original intent of the Presidential Electors Clause. Pinckney emphatically denied that Congress could play any substantive role in the counting of electoral votes. Pinckney said that he

remembered very well that in the Federal Convention great care was used to provide for the election of the President of the United States, independently of Congress; to take the business as far as possible out of their hands. The votes are to be given by Electors appointed for that express purpose, the Electors are to be *appointed* by each State, and the whole direction as to the manner of their appointment is given to the State Legislatures. Nothing was more clear to [Pinckney] than that Congress had no right to meddle with it at all; as the whole was entrusted to the State Legislatures, they must make provision for all questions arising on the occasion.³⁹⁷

Pinckney could hardly have been more emphatic. Toward the end of his speech, he declared that “Congress shall not themselves, even when in convention, have the smallest power to decide on a single vote.”³⁹⁸ His reference to a “convention” must refer to the joint assembly of the houses when the electoral votes are opened and counted. Not even then, Pinckney insists, has Congress “the smallest power to decide on a single [electoral] vote.”³⁹⁹

Pinckney’s speech supports the view that Congress could do no more than witness the vote count. At the same time, Pinckney seemingly assumed, as Justice Story thought the Framers generally did, that the validity of electoral votes would be decided only at the state level and that the function of the Vice President and the joint session in “counting” the votes was therefore merely ministerial. What seems to have escaped Pinckney’s attention is that some types of electoral vote disputes require resolution at the federal level, because they have not been resolved by and within the states.

Accordingly, Jefferson had the final say on the validity of crucial electoral votes. As the Vice President, Jefferson would preside over the vote count. As the Democratic-Republican Party’s leader, he was a

OF THE CONSTITUTION 245 (John Kaminski, et al. eds., 2009), <https://search.library.wisc.edu/digital/ATR2WPX6L3UFLH8I/pages/A5ZOXSDIBAYRNF9C> [<https://perma.cc/TB38-7JV6>]. For Pinckney’s influence on the final document, see generally Margie Burns, *The Mystery of Charles Pinckney’s Draft of the U.S. Constitution Revisited*, 117 S.C. HIST. MAG. 184 (2016). Pinckney was a friend and political ally of Jefferson. See DUNN, *supra* note 264, at 187–88.

397. 10 ANNALS OF CONG. 29 (1851).

398. *Id.* at 139.

399. *Id.*

leading presidential candidate.⁴⁰⁰ Of decisive importance were four electoral votes for Jefferson from Georgia, which contained technical flaws that might have justified their rejection.⁴⁰¹ Without those four votes, Jefferson and Burr would not tie with each garnering fifty percent of the electoral votes. Instead, both would have won only a plurality, necessitating the House to choose the winner from five presidential candidates.⁴⁰² Jefferson declared that the four Georgia votes be counted, precluding the Federalist House from adding any Federalist rivals for consideration.⁴⁰³

As we read the overall record, two lessons emerge from the pre-Twelfth Amendment Founding Era. First, the Vice President was thought to possess some discretion in allowing questionable electoral votes, even when he himself was a candidate. Adams did that in 1796 and Jefferson in 1800. At a minimum, the Vice President was considered the first (and possibly the final) decisionmaker in judging the validity of presidential ballots.

It is possible that either Adams or Jefferson thought that they were bound to receive and count disputable votes as they were certified to them by the states. This may have been more likely for Jefferson, given his and his party's strong support for states' rights. They might have believed that they had no discretion to look for irregularities that would nullify the certificates provided by Vermont and Georgia.⁴⁰⁴ If they held that opinion, they would have acted consistently with Pinckney's view that the whole matter was entrusted to state legislatures, so that neither the Vice President nor Congress had the right to "meddle with" potential vote count disputes.

But neither Adams nor Jefferson confronted a situation where a state either spoke with two or more voices (because different state organs had certified rival electors) or with no voice at all (because the popular vote tally had not been completed in a timely manner).⁴⁰⁵ Thus,

400. Ackerman & Fontana, *supra* note 27, at 583; Kesavan, *supra* note 26, at 1656 n.3.

401. *Id.* at 587–92.

402. Kesavan, *supra* note 26, at 1656 n.3.

403. Ackerman & Fontana, *supra* note 27, at 603. For a meticulously detailed account, see *id.* at 587–610; see also Letter from Thomas Sedgwick to Alexander Hamilton (Dec. 17, 1800), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Hamilton/01-25-02-0133> [<https://perma.cc/DL66-CMSK>] (last visited Nov. 29, 2022) [hereinafter Sedgwick Letter].

404. See Sedgwick Letter, *supra* note 403 (noting that the Georgia electors were evenly split, with no mention of ballot legitimacy).

405. For a detailed discussion of the 1796 and 1800 elections, see generally Ackerman & Fontana, *supra* note 27, and see Colvin & Foley, *supra* note 354, at 484–86, which notes that both Presidents faced allegedly defective votes.

even if their views had coincided with Pinckney's, some cases would still require a federal decisionmaker.

Second, the flaws in the original Constitution's electoral vote scheme were becoming more apparent by 1800. Differing views on responding to that discovery began to emerge. Pinckney's view denied that any federal procedure was necessary or constitutional. But Marshall and other congressmen credited Congress with some power to resolve electoral vote disputes. And the precedents of Adams and Jefferson gave reason to believe that the Vice President possessed discretion to resolve such disputes, though the scope and limits of that discretion remained undefined. The last of these views prevailed until about 1820.⁴⁰⁶

C. The Twelfth Amendment of 1804

The Twelfth Amendment responded to the problems revealed by the election of 1800. The amendment did not change preexisting vote count procedures or practices.⁴⁰⁷ The Jeffersonians who advocated its adoption⁴⁰⁸ were presumably satisfied with the status quo, despite its known and potential problems.⁴⁰⁹ The Twelfth Amendment's framers could have clarified that Congress had the authority to count and judge electoral ballots, as some Federalists had assumed in the debate over the Grand Committee bill.⁴¹⁰ They did not. Through their choice, the

406. MCKNIGHT, *supra* note 357, at 17.

407. Colvin & Foley, *supra* note 354, at 490–91 (“Notably, despite recognition during the Grand Committee debates that significant problems remained about how to deal with disputed electoral returns, Congress retained the ambiguous language” of the original Constitution.).

408. Albert Gallatin raised the idea of such an amendment in his correspondence with Jefferson on September 14, 1801. Letter from Albert Gallatin to Thomas Jefferson (Sept. 14, 1801), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-35-02-0222> [<https://perma.cc/DPN6-TXYH>] (last visited Nov. 29, 2022). It was promoted by Jeffersonians in Congress. HOUSE, *supra* note 386, at 40. One leading Jeffersonian proponent was DeWitt Clinton, a senator from New York, who proposed the amendment on October 21, 1803. *Id.* at 45. The amendment was a starkly, indeed admittedly, partisan one aimed at preventing the Federalists from gaining the Vice Presidency. Even Jefferson himself acknowledged as much. See John J. Turner, Jr., *The Twelfth Amendment and the First American Party System*, 35 THE HISTORIAN 221, 231–35 (1973).

409. See Colvin & Foley, *supra* note 354, at 491 & n.67. Colvin and Foley suggest that had the Jeffersonians sought to cure the problem of the original text's ambiguity, they must have lost some of the congressional support needed to propose the amendment, but cite no evidence for their conjecture. *Id.* at 491.

410. See *supra* notes 398–403 and accompanying text.

earlier constitutional arrangements, which did *not* empower Congress to “meddle with” the question of the validity of a vote, survived.⁴¹¹

Granted, a supporter of a congressional role in electoral dispute settlement could make the reverse argument. Suppose the original understanding of Article II was that the Vice President did not have a role in deciding which electoral votes to count. Instead, the Framers thought that Congress had that power, did not think of the issue, or simply left the question open for the future. If so, the ECA and other similar mechanisms would be warranted by the Constitution, and the Twelfth Amendment did not make any changes. But this approach, like our argument, does not significantly alter the answer to this question because the Twelfth Amendment’s real focus was on the separation of the presidential and vice-presidential races. The amendment itself only repeats Article II’s original language on the opening of the electoral ballots, which indicates a desire to leave that part of the process unchanged.

D. Post-Ratification Evidence from the Early Republic

Here we conclude our review of electoral practices during the Founding period and early Republic by briefly considering three episodes that occurred within the lifetimes of the Twelfth Amendment’s framers: the “Massachusetts Incident” of 1809, the “Indiana Incident” of 1817, and the “Missouri Incident” of 1821.⁴¹² While not as directly relevant as the ratification of the Constitution and the Twelfth Amendment, those materials confirm a prevailing understanding of the electoral vote counting process during the lifetimes of those primarily responsible for the original constitutional materials.

1. The Massachusetts Incident of 1809

The first congressional objection to an elector’s vote occurred in late 1808, when Representative Joseph Barker of Massachusetts introduced a memorial from some of his constituents asking Congress to investigate the vote. The memorial alleged that the appointment of some state electors was “irregular” and violated the state constitution.⁴¹³ Although a resolution to begin an inquiry was passed, nothing further appears to have been done. Objections to holding an inquiry were expressed by some members of the House, one of whom

411. See *supra* notes 404–05 and accompanying text.

412. Kesavan, *supra* note 26, at 1679–83; Colvin & Foley, *supra* note 354, at 491–94. Both works give more extensive accounts of these incidents. For the Massachusetts Incident, the resolutions began in late December 1808 and continued into February 1809. SPECIAL COMMITTEE ON COUNTING ELECTORAL VOTES, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. NO. 44-13, at 37–39 (1877).

413. Kesavan, *supra* note 26, at 1679.

(Representative John Rowan) maintained that the complaint “related to a subject on which the House had no power to legislate.”⁴¹⁴

2. The Indiana Incident of 1817

The second congressional objection occurred after the election of 1816. During the count, Representative John Taylor objected to electoral votes from Indiana on the grounds that the electors had been selected before the state joined the union. The Speaker of the House interrupted Taylor to state that, when assembled in a joint session, the two houses “could consider no proposition nor perform any business not prescribed by the Constitution.”⁴¹⁵ The two houses then separated. The House indefinitely postponed a joint resolution to settle the question. After the Senate reentered the House Chamber, the count resumed.⁴¹⁶ Although the incident does not demonstrate a successful attempt to invalidate electoral votes, the record does state that “[n]o one appeared to question the power of Congress to reject the vote of Indiana if that State was not a State in the Union at the time the electoral votes were cast” (as it was).⁴¹⁷

3. The Missouri Incident of 1821

The Missouri Incident⁴¹⁸ arose in connection with the election of 1821. Missouri was not admitted into the Union until August 1821, well after the votes of the presidential electors had been counted. Missouri adopted a constitution in 1820 and submitted electoral votes. Whether the Missouri votes were to be counted did not affect the outcome. But Missouri’s votes triggered a congressional debate. A joint committee was appointed to examine the question before the vote count. The committee recommended that Congress avoid the issue by counting two sets of electoral votes—one with and the other without the Missouri votes.⁴¹⁹ Henry Clay advocated for this formula, arguing that “the Constitution was silent” on the issue.⁴²⁰ Specifically, Clay argued

414. *Id.* at 1679–80 (quoting H.R. MISC. DOC. NO. 44-13, at 39).

415. *Id.* at 1680; 30 ANNALS OF CONG. 944 (1854).

416. 30 ANNALS 944, 946, 949; Kesavan, *supra* note 26, at 1680–81.

417. Kesavan, *supra* note 26, at 1681 (quoting H.R. MISC. DOC. NO. 44–13 at 47); *see also* 30 ANNALS 944–47 (several representatives gave their opinions on the best way for Congress to address the question of the validity of Indiana’s votes but did not express views that it would be beyond Congress’s power to decide that validity).

418. For a fuller account of the incident, see Colvin & Foley, *supra* note 354, at 492–94.

419. *Id.* at 492 & n.80.

420. *Id.* at 493 (quoting H.R. MISC. DOC. NO. 44-13 at 52). Note the similarity between Clay’s view and Justice Story’s.

against assuming that either the Vice President or Congress alone was constitutionally privileged to decide the issue:

Suppose this [compromise] resolution not adopted, the President of the Senate will proceed to open and count the votes; and would the House allow that officer, singly and alone, thus virtually to decide the question of the legality of the votes? If not, how then were they to proceed? Was it to be settled by the decision of the two Houses conjointly or of the Houses separately? . . . In fact there was no mode pointed out in the Constitution of settling litigated questions arising in the discharge of this duty; it was a *casus omissus* [a gap in the law]⁴²¹

Clay apparently thought it better to avoid resolving the issue there and then, instead deferring the solution to a later constitutional amendment or legislation.⁴²² While Clay apparently did not think that the decision lay with the Vice President, he also did not think that it lay with Congress: in his view, there simply was *no* constitutional dispute resolution procedure. Clay's stance, however, was contested. Congressman John Randolph maintained that it would be unconstitutional even to *avoid* the issue because doing so presupposed that Congress had "the power to decide on the votes of any State."⁴²³

Although Congress ultimately accepted the compromise and the Vice President announced the final electoral vote in hypothetical terms, the Missouri Incident is not a strong precedent for any relevant proposition.⁴²⁴ Even if it did not signal that Congress acquiesced in the view that the Vice President was the final arbiter of the electoral vote count, it also does not show that Congress regarded itself as possessing that authority.

We therefore conclude that evidence from the Founding period until 1821 favors the view that the Vice President had the best claim to be the first mover and final arbiter in the counting of electoral votes. Even though the events of 1821 point in a direction that would differ markedly from the original practice, they do not demonstrate a clear congressional assertion of authority over the counting function or the marginalization of the Vice President's role.

4. From 1821 to 1865

Unlike the ones from the decades immediately following the Constitution's ratification, later practices reveal the gradual emergence of a common (albeit often questioned) belief that Congress has a

421. *Id.* (quoting H.R. MISC. DOC. NO. 44-13 at 52).

422. *Id.*

423. *Id.* (quoting H.R. MISC. DOC. NO. 44-13 at 51). Randolph's view seems to echo Charles Pinckney's. *Id.* at 493 n.85.

424. *Id.* at 493-94; H.R. MISC. DOC. NO. 44-13 at 51.

substantive role to play in the electoral vote count, and the Vice President a correspondingly less significant one.⁴²⁵

Colvin and Foley identify two phases of practice beginning in 1821:

In the second period, from 1821 to 1861, Congress generally found that there was a *casus omissus* in the Constitution as to who should count the votes and what power that actor had to reject votes. In the third period, from 1861 to the present, Congress acted affirmatively to determine the validity of electoral votes and for the first time rejected some votes.⁴²⁶

The postbellum period, the contested presidential election of 1876, the congressional involvement in resolving the disputes surrounding the elections from 1865 to 1873, and the eventual enactment of the ECA of 1887 all show the zenith of an interventionist Congress.

Between 1821 and the Civil War, Congresses became more aware of the Twelfth Amendment's vagueness.⁴²⁷ The 1856 election saw one incident that occasioned two days of congressional debate on the subject. A massive snowfall in Wisconsin prevented the state's electors from casting their votes on the appointed day. The Vice President's decision to count Wisconsin's votes was challenged in Congress. However, the debate proved inconclusive, and that ruling was not overturned.⁴²⁸

E. From the End of the Civil War to the End of Reconstruction

Of greater significance was Congress's decision in 1865 to adopt the Twenty-Second Joint Rule. This inaugurated the third period, representing the most aggressive congressional assertion of authority over the counting to that date:

Congress continued [its] practice of waiving the issue and ignoring electoral disputes until 1865. That year, Congress adopted a joint rule that gave it "unfettered discretion to reject electoral votes when only one house of Congress objected to receiving the votes." The Twenty-second Joint Rule is the broadest reach Congress has ever asserted over the electoral

425. This position itself had antecedents. As discussed above, many members of Congress in the 1800 debate over the Federalists' Grand Committee proposal, including Congressman John Marshall, believed that Congress had a constitutional role to play in the vote count. *See supra* notes 390–95 and accompanying text; 1 REG. DEB. 420–34, 446–61, 490–516 (1825) (providing the opposing viewpoints of House of Representatives members regarding the extent of the House members' power to choose the President, in the event no candidate receives a majority of the vote in the general election, without the need to show deference to constituents).

426. Colvin & Foley, *supra* note 354, at 480–81.

427. MCKNIGHT, *supra* note 357, at 17–19.

428. For the incident, see Colvin & Foley, *supra* note 354, at 495–97.

count. Under the rule, an objection to an electoral vote would have the ultimate effect of a near presumption to reject that set of votes. On February 4, 1865, Congress passed a joint resolution excluding the electoral votes of the southern states, including Louisiana and Tennessee, which at the time were back under Union control. . . . The year 1865 marked the first time that Congress rejected the votes of a state, as well as a new period of understanding of the electoral count.⁴²⁹

Following its 1865 precedent, the Reconstruction Congress rejected votes from the former Confederate states in 1869 and 1873.⁴³⁰

Further, Section 3 of the Fourteenth Amendment disqualified certain persons who had taken an oath to support the Constitution but had thereafter rebelled against the Union from being presidential or vice-presidential electors. That disability could, however, be removed: “But Congress may by a vote of two-thirds of each House, remove such disability.”⁴³¹ Although the language refers to “two-thirds of *each* House,” suggesting that the houses were to act separately (and so that Congress was not acting in a lawmaking capacity here), Congress did occasionally lift that disability by statute.⁴³² That language suggested that it would be reasonable to maintain that when the electoral votes were being counted before a joint session of Congress, the two houses could have entertained and decided upon an objection that a purported elector was disqualified under the Section. If so, the two houses would have claimed implicit constitutional authority to intervene in the electoral count and to pass judgment on the vote *to at least that extent*. The framers of Section 3 may have assumed, however, that the houses possessed the broader authority to intervene on other grounds as well.

Granted, Congress’s practices from 1865 to 1877 provide support for its authority to regulate or even decide the electoral vote count. But the special circumstances of the Civil War and Reconstruction counsel against giving undue weight to that evolving practice. The Reconstruction Congresses relied heavily on the Republican Guarantee Clause to sustain the constitutionality of their policies on former Confederate states’ readmissions into the Union.⁴³³ Scholars have contended that

429. *Id.* at 497–98 (quoting Siegel, *supra* note 139, at 557). However, even though the joint rule represented an unprecedented congressional intrusion into the electoral vote counting process, its objective was apparently to exclude whole *states* from voting, not to decide on particular *electors*. Kesavan, *supra* note 26, at 1675.

430. Colvin & Foley, *supra* note 354, at 498.

431. U.S. CONST. amend. XIV, § 3.

432. *See, e.g.*, Act of Dec. 14, 1869, ch. 1, 16 Stat. 607.

433. David S. Louk, *Reconstructing the Congressional Guarantee of Republican Government*, 73 VAND. L. REV. 673, 705–08, 711–17 (2020). On the meaning of that clause, see, for example, and generally, Ryan C. Williams,

congressional rejections of electoral votes from the former Confederate states of Louisiana and Tennessee were “constitutional exercise[s] of Congress’[s] exclusive power to recognize states as members of the Union.”⁴³⁴ Thus, congressional interventions in the electoral vote count during Reconstruction might have been considered justifiable, not on the basis of the Twelfth Amendment, but under the Republican Guarantee Clause.

In any event, the unprecedented congressional interventions cast a long shadow forward. They flowered into the Great Compromise that resolved the 1876 election, which in turn led to the ECA of 1887.⁴³⁵ The Twenty-Second Joint Rule of 1865 was therefore merely the starting point for those congressional activities. Years before the ECA’s enactment, Congress had injected itself into the electoral vote count in ways that would have startled Henry Clay in 1821, let alone Charles Pinckney in 1800. Between 1861 and 1877, the idea that Congress could rule dispositively on electoral vote disputes progressively became dominant.⁴³⁶ By 1886, the Select Committee charged with reporting on the Act confidently said:

The two Houses are, by the Constitution, authorized to make the count of electoral votes. . . . The power to determine rests with the two Houses, and there is no other constitutional tribunal. Congress prescribes the details of the trial and what kind of evidence shall be received, and how the final judgment shall be rendered.⁴³⁷

Yet even in this period, as we shall see, there were some congressmen who maintained that the responsibility for counting lay solely with the Vice President.

F. The Election of 1876

This election pitted Republican Rutherford B. Hayes against Democrat Samuel J. Tilden. Tilden had won the majority of the popular vote, but electoral votes would decide who won the Presidency.⁴³⁸ The

The “Guarantee” Clause, 132 HARV. L. REV. 602 (2018) and Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994).

434. Ross & Josephson, *supra* note 96, at 730.

435. *See infra* Parts III.F–G.

436. MCKNIGHT, *supra* note 357, at 19–20.

437. 18 CONG. REC. 30 (1887).

438. Ken Drexler, *Presidential Election of 1876: A Resource Guide*, LIBR. CONG., <https://guides.loc.gov/presidential-election-1876/introduction> [<https://perma.cc/VJB8-E9C6>] (Sept. 20, 2022); Colvin & Foley, *supra* note 354, at 502–03.

ensuing disputes led the Forty-Fourth Congress to pass the Electoral Commission Act, which President Grant signed into law on January 29, 1877.⁴³⁹ The votes of an ad hoc body that Congress had created according to that act ultimately determined the outcome.⁴⁴⁰

The 1877 act provided that the Electoral Commission was to consist of fifteen members: five selected by the House of Representatives, five selected by the Senate, four Supreme Court Justices named by the act, and a fifth Justice to be picked by the four serving on the Commission. Whenever a state submitted two sets of electoral votes, the Commission was to determine which return was correct. Its conclusions did not bind Congress, but they could be overturned only through joint acts by both congressional houses.⁴⁴¹ This procedure was unprecedented.⁴⁴² Congress apparently assumed that it had the constitutional power to judge and resolve disputes over the vote count and to delegate at least some of that power to another body.

Well before that election, many congressmen had anticipated that challenges against electoral votes (especially ones involving competing slates from a single state) would arise.⁴⁴³ They began searching for ways to address such scenarios and avert a possible national crisis.

The preventive search began in 1868. On March 24 of that year, Representative and later President James A. Garfield offered a resolution that would have directed the House Committee on the Judiciary to “inquire into the expediency of providing by law for the settlement of contested elections for electors of the President and Vice President.”⁴⁴⁴ Garfield urged that “it would be a great calamity should the time ever come when one State of the Union, perhaps holding the balance of power, should appear in the Electoral College by two sets of electors, and there was no provision to settle the question.”⁴⁴⁵ Although the House adopted the resolution, the Judiciary Committee did not report out a measure.⁴⁴⁶

Nearly eleven months later, in February 1869, a controversy arose over nine electoral votes from Georgia for the previous November’s

439. Colvin & Foley, *supra* note 354, at 503–07; Electoral Commission Act, ch. 37, 19 Stat. 227 (1877).

440. Electoral Commission Act § 1.

441. *Id.* § 2.

442. See generally FAIRMAN, *supra* note 21, for a scholarly account of the background to the Electoral Commission, its creation, and its activities.

443. H.R. 2260, 42nd Cong. (1872) (proposing to regulate the count of electoral votes four years before the Electoral Commission Act was passed); FAIRMAN, *supra* note 21, at 2 (referencing the worry of competing slates from a single state).

444. FAIRMAN, *supra* note 21, at 2.

445. *Id.* at 2–3.

446. *Id.* at 3.

election. That dispute “gave an early warning” of problems that came to a head with the 1876 election.⁴⁴⁷ Although the decision would not have determined who won the presidential race as Ulysses S. Grant had sufficient undisputed electoral votes, congressmen clashed over the potential effect of a concurrent resolution that both houses adopted that February, shortly before the houses met to witness the vote count.⁴⁴⁸ During the count, Representative Benjamin Butler objected that, regardless of the prior concurrent resolution, “the [electoral] votes must be counted or rejected by the convention of both Houses . . . [T]his is a matter of constitutional law.”⁴⁴⁹ Further, Butler raised four specific objections to counting Georgia’s electoral votes. The Senate voted to reject Butler’s objections as out of order, and the Vice President, presiding over the congressional joint meeting, ruled accordingly.⁴⁵⁰ In the ensuing House debate over that ruling, several constitutional arguments emerged. Representative Samuel Shellabarger maintained that “in the absence of legislation,” the electoral votes were to be opened and counted by the Vice President.⁴⁵¹ Representative James Thomas countered that “Congress had the power, by law or by joint resolution, not only to prescribe the manner in which the vote should be counted, but to inquire into the validity, the sufficiency, the actuality of the votes that might be presented to the Vice President to be counted.”⁴⁵² Representative Garfield affirmed that the votes had to be dealt with in accordance with the February concurrent resolution’s terms.⁴⁵³ Although there were material differences between these opinions, all three presupposed that Congress had a significant and decisive role in the counting.

From 1875 to the troubled election, Congress again grappled, over several sessions, with constitutional problems of the electoral vote count. The run-up to the 1876 election saw extended Senate debates over a variety of legislative proposals, none of which became law before the 1876 election.⁴⁵⁴ Those debates produced “a kaleidoscope of opinions.”⁴⁵⁵ The prevailing view in the debates was that Congress

447. *Id.* at 6–9; S. Res. 46, 40th Cong. (1869).

448. FAIRMAN, *supra* note 21, at 7–8.

449. *Id.* at 7.

450. *Id.* at 7–8; H.R. MISC. DOC. NO. 44-13, at 267–69 (1877).

451. FAIRMAN, *supra* note 21, at 8; H.R. MISC. DOC. NO. 44-13, at 272–76 (1877).

452. FAIRMAN, *supra* note 21, at 8–9; H.R. MISC. DOC. NO. 44-13, at 285 (1877).

453. FAIRMAN, *supra* note 21, at 9.

454. For a history of congressional debates over the electoral vote count from 1875–1876, see FAIRMAN, *supra* note 21, at 9–22.

455. *Id.* at 37–38.

possessed substantive constitutional authority over the count.⁴⁵⁶ And that assumption, of course, was embodied in the enactment of the Electoral Commission Act of 1877.

The dominant opinion was vigorously challenged in at least four distinct ways. And the fifth emerged during the consideration of the Electoral Commission Act. Most of these five positions had support presented earlier in America's constitutional history. They are as follows.

The first view harkened back to Pinckney's opinions in the debates of 1800. Its most prominent advocate was Senator Thomas Bayard. Bayard insisted that neither Congress nor the Vice President had any electoral role. He also argued that all such questions had to be decided at the state level. He reasoned:

I confess that I do not see where the power can possibly be found which is assumed by the [Twenty-Second] joint rule, either as it now stands or as it is proposed to be amended, giving the two Houses of Congress right to say whether votes shall be counted or not be counted. The Constitution declares that the electors of the States, chosen in such manner as the people in those States shall see fit to direct by law, shall have their certificates of election signed and certified *by themselves*; and when they have been so signed and certified shall then be sealed and transmitted to certain officials of the Federal Government. The duty of the President of the Senate is simply ministerial. He is not vested with discretionary or judicial functions. . . . He cannot even inspect [the certificates], except in the incidental and casual manner that is implied by the fact that his hand shall open the sealed envelope which contains the list of the electoral votes. Then the votes "shall be counted" in the presence of the two Houses.⁴⁵⁷

As Fairman explains Bayard's position, "the choosing and certification of Presidential electors is exclusively a concern of the State: the President of the Senate does no more than open the envelope; Members of the Senate and House sit as witnesses."⁴⁵⁸ But, as Fairman notes, there is a critical problem for Bayard's analysis: "He has no answer to the possibility that there might be more than one certificate from a State."⁴⁵⁹ Second, Senator Augustus Merrimon advanced (but later retracted) the position that Congress "in joint assemblage" had the authority to judge "every [relevant] question" but that Congress,

456. *See id.* at 38.

457. *Id.* at 10–11; H.R. MISC. DOC. NO. 44-13, at 444–45 (1877).

458. FAIRMAN, *supra* note 21, at 11.

459. *Id.* Senator Charles Jones suggested at one point that the states, rather than Congress, could create a procedure for resolving disputes over contending slates of electors. *Id.* at 28. But that of course merely pushes the problem back a stage, for what body is to be recognized as "the state"?

as an Article I lawmaking body, could not regulate that assembly.⁴⁶⁰ Merrimon apparently considered the electoral joint session to be a constitutionally distinctive, self-regulating body:

The vote must be counted by the Congress in joint assemblage; it must be the act of this joint assemblage; and I maintain that, touching the counting of the vote, every question that shall arise must be decided by the Congress, not as two separate bodies, but as the Congress sitting as a joint assembly.⁴⁶¹

Merrimon envisaged that the procedure would resemble the selection of senators by state legislatures, which, he said, met as joint bodies to cast votes and continued to do so until a winner emerged.

Third, Senator William Whyte asserted that the Vice President possessed the sole final discretion.⁴⁶² Whyte relied on both constitutional text and early historical practices, beginning with John Langdon's role in the vote count of 1788.⁴⁶³ The Vice President, Whyte said, "is the proper person to state which vote shall be counted, because the Constitution has put it in his hands . . . in plain and unmistakable words."⁴⁶⁴

And:

[I]n the beginning the eye of Congress was turned to this very question and they recognized that the President of the Senate . . . was the proper person to discharge the duty of making the count and announcing it to the two Houses.⁴⁶⁵

Whyte summarized his position thus:

I say that Congress has no right to assume to itself to decide which is the right return, because the Constitution has put it in the hands of the President of the Senate, and until you amend the Constitution you have no right to take it away from him. That is my argument.⁴⁶⁶

460. *Id.* at 19–20.

461. *Id.*; H.R. MISC. DOC. NO. 44-13, at 492 (1877).

462. FAIRMAN, *supra* note 21, at 24–25. Senator John Stevenson also supported Whyte's view. *Id.* at 29.

463. *Id.* at 27; *see also* Letter from George Washington to John Langdon (Apr. 14, 1789), in GEORGE WASHINGTON PAPERS, Series 2, Letterbooks 1754–1799 (Library of Congress ed.), <https://www.loc.gov/resource/mgw2.025/?sp=5&st=text> [<https://perma.cc/2D2M-E9ZE>] (describing Langdon's role in the election of 1788).

464. *Id.* at 24–25; H.R. MISC. DOC. NO. 44-13, at 536 (1877).

465. FAIRMAN, *supra* note 21, at 27; H.R. MISC. DOC. NO. 44-13, at 575 (1877).

466. 4 CONG. REC. 1805 (1876); H.R. MISC. DOC. NO. 44-13, at 578 (1877).

Fourth, several senators believed that Congress had the power, whether by a statute or a joint resolution, to settle electoral disputes or to directly count the votes.⁴⁶⁷ Thus, Senator Alan Thurman stated that “the spirit of the Constitution requires that these votes shall be counted in some mode by Congress, or the convention of the two Houses.”⁴⁶⁸ Thurmon cited the Sweeping Clause in support of congressional authority to legislate on the subject.⁴⁶⁹ Senator Frelinghuysen did not locate the source of congressional authority in any particular clause, but in the Constitution as a whole:

[W]here the Constitution commits a subject to Congress and yet leaves it so undefined, so general, we have a power according to our discretion by law to carry out the authority committed to us⁴⁷⁰

Some believed that the Constitution did *not* provide Congress with the authority to decide disputes over the votes, but that the necessity of the case required that Congress take (presumably, extra-constitutional) action. Thus, Senator Oliver Morton argued:

It was not the intention that Congress should have that power. That was placed with the States; and it was the theory that the election of President should be left to the States and taken away from Congress. You cannot provide for that except by amending the Constitution I do not believe myself the power exists; but there is divided sentiment here. We cannot act upon any other position except that the power does exist.⁴⁷¹

Toward the end of the debates, Morton returned to the idea of necessity, observing that “this discussion has demonstrated the absolute necessity of the adoption of a law upon this subject. . . . The 4th of March [i.e., Inauguration Day in 1877] is close at hand. An utter diversity of opinion exists as to where the power is.”⁴⁷²

The debates preceding the 1876 election demonstrate an “utter diversity of opinion . . . as to where the power is.”⁴⁷³ And that intractable diversity precluded Congress from enacting legislation

467. FAIRMAN, *supra* note 21, at 26–28. Within this camp, there were important disagreements as to whether Congress could constitutionally delegate its power and, if so, to whom, and as to whether judicial review, or some other form of judicial involvement, would be permissible. *Id.*

468. *Id.* at 27.

469. *Id.* at 24, 29.

470. *Id.* at 26.

471. H.R. MISC. DOC. NO. 44-13, at 454 (1877).

472. *Id.* at 667.

473. *Id.*

before the election.⁴⁷⁴ The resulting disputes made action imperative. And the answer came in the form of ad hoc legislation: the Electoral Commission Act of 1877.

The House debate over that ad hoc measure led to the fifth theory, enunciated by Representative Garfield.⁴⁷⁵ In his view, the power lay in the Vice President. But that power was subject to Congress's final review.⁴⁷⁶ Garfield's position was that "he would accept the exposition of the venerable Chancellor Kent that *in the absence of legislation on the subject* it would be the duty of the President of the Senate to count the votes and declare the result."⁴⁷⁷

Overall, the debates and practices between 1865 and 1877 add weight to the idea that Congress has the constitutional authority to resolve electoral count disputes. Most significantly, they culminated in the adoption of the Electoral Commission Act of 1877, a plain assertion of congressional authority over the subject. Furthermore, in the debates

474. FAIRMAN, *supra* note 21, at 35–38.

475. Garfield had also expressed an opinion in a letter to Rutherford B. Hayes during the Hayes-Tilden electoral dispute. The Republicans controlled the Senate, and some Republican senators were of the view that the president pro tempore of the Senate had the authority to decide the electoral vote count. Their position gave way, however, in favor of the compromise that created the Electoral Commission. Garfield objected adamantly to the compromise.

He "was indignant about the Senate's decision to back the Commission, writing to Rutherford B. Hayes that the Senate simply needed to 'support its presiding officer in following the early precedents, which were made under the fresh impulses of the constitution.'" Colvin & Foley, *supra* note 342, at 1046 n.14 (citing 1 THEODORE CLARKE SMITH, *THE LIFE AND LETTERS OF JAMES GARFIELD* 629 (1925)).

476. Elsewhere, the Constitution makes provision for a similar sharing of power between the branches. Thus, the President as Commander in Chief may lay down codes of conduct for the military, but Congress, pursuant to its Article I, Section 8, Clause 14 power to adopt rules and regulations for the military, may supersede the presidential codes. *See Loving v. United States*, 517 U.S. 748, 759, 773–74 (1996).

477. FAIRMAN, *supra* note 21, at 51 (emphasis added). Garfield was referring to Chancellor James Kent, Commentaries on American Law Lecture 13(3),

The Constitution does not expressly declare *by whom* the votes are to be counted, and the result declared. In the case of questionable votes, and a closely contested election, this power may be all-important; and I presume, in the absence of all legislative provision on the subject, that the President of the Senate counts the votes and determines the result, and that the two houses are present only as spectators, to witness the fairness and accuracy of the transaction, and to act only if no choice be made by the electors.

1 COMMENTARIES ON AMERICAN LAW BY JAMES KENT 277 (William M. Lacy, ed., Philadelphia, The Blackstone Publ'g Co. 1889).

leading up to that statute, several leading congressmen opined that such a statute would be within the scope of Congress's authority.

But several considerations dilute this argument. First, the Electoral Commission Act was an unprecedented statute. In the congressional debates in the years preceding the act and during its passage through Congress, many congressmen contended (albeit on different grounds) that such a measure was beyond Congress's constitutional authority. Second, such congressional intervention in vote counts and the practice of the Framing period were inconsistent. And the constitutional arguments for congressional authority rested primarily on the Sweeping Clause—which, as we have argued, is not a basis for such electoral intervention. Overall, the debates reveal the “utter diversity” of constitutional opinions that contemporaneous politicians harbored. Finally, some congressmen who favored the Electoral Commission Act may also have believed it to be unconstitutional, but still supported it because they considered such a statute politically necessary to prevent another violent conflict. In short, the “practical construction” of the Twelfth Amendment in this period is inconclusive.

G. The Electoral Count Act of 1887

With the passage of the Electoral Commission Act of 1877, Congress crossed the constitutional Rubicon. Congress effectively declared itself the final arbiter of electoral votes, not the Vice President or the states.⁴⁷⁸ Five Justices had participated in and thereby sanctioned the Commission.⁴⁷⁹ The force of this precedent, coupled with the desire to avoid another ad hoc solution, led to the birth of a regular, stable procedure for resolving electoral vote disputes. The ECA had arrived.

Congress had considered legislative proposals for over a decade before legislating the Act.⁴⁸⁰ As a result, the Act's legislative history is long and complicated.⁴⁸¹ But the main arguments made on behalf of its constitutionality may be found in the remarks of Congressman Andrew Caldwell, the Chair of the Select Committee on the Election of the

478. Although the Act did provide for a judicial role in the dispute resolution process—in the presence of five Supreme Court Justices on the Electoral Commission—it did not authorize judicial review of Congress's ultimate decision. The Electoral Act of 1877, 19 Stat. 227–29. In that sense the Act also denied the federal courts, like the Vice President and the states, the final say.

479. FAIRMAN, *supra* note 21, at 38, 53.

480. Eric Schickler, Terri Bimes & Robert W. Mickey, *Safe at Any Speed: Legislative Intent, the Electoral Count Act of 1887, and Bush v. Gore*, 16 J.L. & POL. 717, 732–36 (2000).

481. For reviews of the legislative history, see FOLEY, *supra* note 21, at 154–60; Colvin & Foley, *supra* note 342, at 1050–52; Schickler et al., *supra* note 480, at 732–36; Ross & Josephson, *supra* note 96, at 722–25.

President and the Vice-President, when that committee reported out a version that was to become the final bill. Caldwell's remarks are a careful summation of years of congressional debates on the legislature's constitutional powers from the point of view that prevailed in the Grand Compromise of 1877 and would again prevail in 1887.⁴⁸²

Caldwell saw the bill as the "authoritative expression of the Constitution erected into law in advance of any complication which may again arise, as it has in the past, as to the counting the electoral votes of the States and the declaration of the result."⁴⁸³ Acknowledging that "the Electoral College, and not Congress, is charged with the duty of making the election of President and Vice-President, and that the selection of the electors belongs exclusively to the States, and no department of the Federal Government is allowed to participate in the creation of the electors," he insisted that "the right is also reserved to that Government, through and by the agency and under the supervision of the Senate and House of Representatives, to judge of the legality of returns The power of the two Houses in counting the vote is something more than ministerial and perfunctory merely."⁴⁸⁴ Accordingly, he reasoned:

Congress may provide by law or joint rule the manner of counting the vote. The presence of the two Houses when the vote is counted is a constitutional injunction, and is required from the fact that if there is no election by the electors, the duty of electing a President is devolved upon the House of Representatives; and of a Vice-President, upon the Senate. They are to be present at the count to ascertain and declare the result, if any, of the action of the Electoral College; or, in default thereof, to separate and elect the officers themselves. They are to count the votes. What votes? Legal votes. Then they are to determine what are legal votes, and who has a majority of legal votes. The power to judge of the legality of the votes is a necessary consequent of the power to count. The existence of this power is of absolute necessity to the preservation of the Government.⁴⁸⁵

Caldwell then affirmed four points. First, Congress had the constitutional authority to enact the bill under the Sweeping Clause. Second, the Vice President had no substantive role in validating the vote count. Third, the Constitution conversely assigned a significant role to Congress in the process. Fourth, the House and the Senate had

482. FOLEY, *supra* note 21, at 154–60. For an analysis of Caldwell's remarks, see Colvin & Foley, *supra* note 342, at 1081–83.

483. 18 CONG. REC. 30 (1886).

484. *Id.*

485. *Id.*

“equal and concurrent powers” in determining the validity of disputed votes:

This bill is to prescribe the mode in which this count shall be made, and supply the omission that exists under the first article of the Constitution, which gives Congress all power to make all laws necessary to carry out these provisions. The passage of this bill will settle all the questions which have arisen from time to time as to the electoral count.

It will decide, first, that the power to count the vote is not in the President of the Senate.

Second, that it is in the two Houses of Congress, not ministerially merely, not as witnesses, capable of nothing but inexplicable dumb show and noise; but with power to count, and the consequent power to decide upon the legality of the votes to be counted.

Third, that the action of the two Houses shall be separate and concurrent upon all questions of contest arising under the count, but joint as to results, thus preserving the dignity and rights of the two bodies by conceding to each equal and concurrent powers in counting and judging of the validity of electoral votes without merger of the lesser body into the numerically greater.⁴⁸⁶

Caldwell also argued that Congress had an affirmative duty to reject votes proffered by unconstitutionally appointed electors or cast by them in unconstitutional ways:

It is certainly absurd to try to deny to Congress the power to remedy an unlawful return, although it might be the only return.

Instances have been often cited and may be again. Under section 4, article 4, of the Constitution “the United States shall guarantee to every State in the Union a republican form of government.” Suppose some State should enthrone a king, constitute a house of lords, and they should appoint electors, and send up but one return properly certified and finally determined as required under the second section of the bill proposed by the minority. Shall an American Congress count such a vote? Suppose under [Section 3 of] the fourteenth amendment, which deprives a State of electoral votes in proportion as that State shall have denied the right to vote to its citizens of color—suppose there is but one return of that State, duly certified, of the full number of electors, who is to decide the number to be deducted? In neither case, if a future Congress would obey such a law, could Congress help itself from counting such illegal votes, although both Senate

486. *Id.* at 30–31.

and House of Representatives might know that they violated these sections of the Constitution to count them.⁴⁸⁷

Caldwell's arguments are substantively the same as those we reviewed when considering the Electoral Commission Act. But there is a degree of novelty. In particular, he insisted that Congress has a duty to intervene in order to prevent an unconstitutional elector from voting or to exclude an unconstitutional ballot. Though Caldwell did not identify the constitutional source of this claim, it could plausibly be found in Section 2 of Article VI, which requires congressmen to take an oath to support the Constitution.⁴⁸⁸ He might have thought that congressional inaction in the face of an invalid vote count that Congress was witnessing would breach that oath.

The ECA should receive substantial weight in construing the Twelfth Amendment for three reasons. First, it is the product of several Congresses' reflections since the 1860s. The legislation survived formidable constitutional objections during that period. Second, unlike the Electoral Commission Act, the Act was not an emergency ad hoc response to a brewing national crisis. Third, over the succeeding decades the Act has been treated as a benchmark by Congress and by Vice Presidents presiding over vote counts.⁴⁸⁹ Thus far, it has not been successfully challenged in the courts.

But those three rationales by no means imply that the ECA is constitutional. The counterarguments, we think, are decisive. The practical applications of the ECA are of weight, but not so entrenched to the point the ECA should be regarded as constitutional. Congressional challenges were rare until 2000 but have become more common since then.⁴⁹⁰ In 1969, when a "faithless elector" from North Carolina voted for George Wallace instead of Richard Nixon, Senator Edmund Muskie and Representative James O'Hara raised objections,

487. *Id.* at 31.

488. U.S. CONST. art. VI, § 2.

489. FOLEY, *supra* note 21, at 157–60; FAIRMAN, *supra* note 21, at 49–53.

490. Former Judge J. Michael Luttig and David P. Rivkin, Jr., who argue that the ECA is unconstitutional in key respects, note the rarity of practice under it. "The most constitutionally offensive provision gave Congress the absolute power to invalidate electoral votes as 'irregularly given,' a process that a single representative and senator can trigger by filing an objection. Fortunately, this provision has seldom been invoked—only twice before 2021—and no objection has ever been sustained." J. Michael Luttig & David B. Rivkin, Jr., *Congress Sowed the Seeds of Jan. 6 in 1887*, WALL ST. J. (Mar. 16, 2021, 11:59 PM), <https://www.wsj.com/articles/congress-sowed-the-seeds-of-jan-6-in-1887-11616086776> [<https://perma.cc/52BV-ZZ29>].

which were rejected by each house.⁴⁹¹ After the 2004 election, Senator Barbara Boxer, joined by Representative Stephanie Tubbs Jones, objected to the certification of Ohio's electoral votes.⁴⁹² The Senate rejected Senator Boxer's challenge by a 74–1 vote and the House Representative Jones's by a 267–31 vote.⁴⁹³

The Vice President's acts while presiding over a joint session are more significant examples than ones involving episodic congressional protests. Three instances deserve scrutiny here: Richard Nixon in 1961, Al Gore in 2001, and Joe Biden in 2017. Vice President Nixon was the presiding officer at the joint session of January 6, 1961.⁴⁹⁴ He received three certificates "from persons claiming to be the duly appointed electors from the State of Hawaii."⁴⁹⁵ The initial popular vote count in Hawaii declared Nixon the victor in that state by a margin, and the Hawaii governor certified that result. But the initial result was contested and a recount was made. The recount was not completed until December 27, 1960.⁴⁹⁶ Meanwhile, two sets of purported electors cast their votes on December 19, 1960, and forwarded their certificates to Washington, D.C. Eleven days after the forwarding, a Hawaiian state court, acting under the state's electoral contest statute, ascertained that Democrat John F. Kennedy won the state by 115 votes. The governor certified the Kennedy electors on January 4 of the following year.⁴⁹⁷ At the joint session, Nixon stated that "[t]he Chair has knowledge[] and is convinced that he is supported by the facts" that the certificate for the Kennedy electors "legally portrays the facts with respect to the electors chosen by the people of Hawaii."⁴⁹⁸ Nixon, "without the intent of establishing a precedent," asked for and received unanimous consent from the joint session to accept the Kennedy electors.⁴⁹⁹ Nixon's action may not even have rested on the ECA, which he did not cite.

491. See ELIZABETH RYBICKI & L. PAIGE WHITAKER, CONG. RSCH. SERV., RL32717, COUNTING ELECTORAL VOTES: AN OVERVIEW OF PROCEDURES AT THE JOINT SESSION, INCLUDING OBJECTIONS BY MEMBERS OF CONGRESS 6–7 (2020).

492. *Id.* at 7; see also LOFGREN, *supra* note 29, at 6.

493. 151 CONG. REC. H89, H127 (daily ed. Jan. 6, 2005).

494. 87 CONG. REC. 287, 289 (1961).

495. *Id.* at 289.

496. *Guide to the Ronald B. Jamierson Personal Papers*, JOHN F. KENNEDY LIBRARY, <https://www.jfklibrary.org/sites/default/files/archives/RBJPP/RBJPP-FA.xml> [<https://perma.cc/9QLC-FL3V>] (last visited Dec. 22, 2022).

497. 87 CONG. REC. 287, 289–91 (1961).

498. H.R. DOC. NO. 94-661, at 1568–69 (1961).

499. *Id.* at 1569; see JACK MASKELL, T.J. HALSTEAD & ANGIE WELBORN, CONG. RSCH. SERV., RL30769, ELECTORAL VOTE COUNTS IN CONGRESS: SURVEY OF CERTAIN CONGRESSIONAL PRACTICES 26 (2020).

Second, Vice President Gore, the Democratic nominee in 2000, chaired the joint session of January 6, 2001. There, he announced the victory of George W. Bush. Several Democratic members of the House of Representatives repeatedly objected to the electoral count and sought the assistance of at least one senator in forcing a debate under the ECA. Relying on the Act, Gore urged Democratic senators not to join this request, and none did. Subsequently, Gore gaveled down the protesting House members without senatorial support.⁵⁰⁰

Third, several House members, including Representative Barbara Lee, objected in 2017 to the acceptance of electoral votes for Trump.⁵⁰¹ Vice President Biden asked if any senator joined the objection. Confirming that there was none, Biden ruled that the objection “cannot be entertained.”⁵⁰²

Taken together, these instances indicate that Congress has intermittently used the ECA to challenge electoral votes and that two Vice Presidents invoked or mentioned the Act in rejecting challenges to those votes. The practice, though a little sporadic, tilts the balance in favor of the Act’s constitutionality.

IV. FOUR OBJECTIONS

In this Part, we evaluate the four chief objections to the analysis we have given so far. First, our understanding of the Vice President’s counting function violates the bedrock norm that no one is to be a judge in his or her own case. Second, the Constitution could not have permitted the vast discretionary power we ascribe to the Vice President alone. Third, our argument assumes that the ECA is unconstitutional, as it presupposes that Congress can only watch the electoral vote counting. Fourth, we give undue reverence to the original Founding practice of the Founding period, which the Supreme Court is unlikely

500. 147 CONG. REC. 4, 34–36, 44 (2001); *see also* Ron Elving, *Objecting to Electoral Votes in Congress Recalls Bitter Moments in History*, NPR (Jan. 5, 2021, 5:00 AM), <https://www.npr.org/2021/01/05/952883116/objecting-to-electoral-votes-in-congress-recalls-bitter-moments-in-history> [<https://perma.cc/G9DB-ZGWT>]; Edward Walsh & Juliet Eilperin, *Gore Presides as Congress Tallies Votes Electing Bush*, WASH. POST (Jan. 7, 2001), <https://www.washingtonpost.com/archive/politics/2001/01/07/gore-presides-as-congress-tallies-votes-electing-bush/0461e40f-3317-4a7e-a1ad-2232aae304db/> [<https://perma.cc/KAK2-NQJ5>].

501. Elving, *supra* note 500.

502. *Id.*; Brenna Williams, *11 Times VP Biden Was Interrupted During the Electoral Vote Count*, CNN (Jan. 6, 2017, 5:45 PM), <https://www.cnn.com/2017/01/06/politics/electoral-college-vote-count-objections/index.html> [<https://perma.cc/7C67-PZL9>]; Scott Detrow, *Biden Chides Democrats During Formal Counting of Electoral Votes*, NPR (Jan. 7, 2017, 8:08 AM), <https://www.npr.org/2017/01/07/508668086/biden-chides-democrats-during-formal-counting-of-electoral-votes> [<https://perma.cc/467H-NJMK>].

to adopt, and instead favor a more pragmatic approach embodied in the “faithless elector” case, *Chiafalo v. Washington*.⁵⁰³ Our responses are presented below.

A. Nemo Iudex Sui

In *The Federalist No. 10*, James Madison wrote: “No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”⁵⁰⁴ The Supreme Court has characterized this principle as “a mainstay of our system of government.”⁵⁰⁵ The principle has its roots in the celebrated *Bonham’s Case*.⁵⁰⁶ In 1702, Chief Justice Holt revived the maxim.⁵⁰⁷ The early Supreme Court in *Calder v. Bull*⁵⁰⁸ characterized the Madisonian view as among the “first principles of the social compact.”⁵⁰⁹ The Court has affirmed the principle in other cases.⁵¹⁰

The Constitution reflects this principle at several points, including ones addressing the election and removal of a President. Clause 2 of Article II, Section 1 prohibits a state legislature from appointing any senator or representative as a presidential elector. The clause seeks to prevent a congressperson from voting for him- or herself for the Presidency. Likewise, Clause 6 of Article I, Section 3 designates the Chief Justice as the presiding officer at any Senate impeachment trial of a President. Since the Vice President would preside at the impeachment trial and the official would have an interest in the Presidency, the Constitution requires the Vice President to serve in the Chief Justice’s role. Also, the Supreme Court reasoned in *Nixon v. United States*⁵¹¹ that

503. 140 S. Ct. 2316, 2322 (2020).

504. THE FEDERALIST No. 10, at 47 (James Madison) (Clinton Rossiter ed., 1961).

505. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 428 (1995).

506. *Bonham’s Case* (1610) 77 Eng. Rep. 638, 640, 646; 8 Co. Rep. 106 b, 108 b, 113 b; see *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 329–30 n.* (2007) (Scalia, J., concurring) (citing *Bonham’s Case* for the “ancient maxim ‘*aliquis non debet esse Iudex in propria causa*’—no man ought to be a judge of his own cause”); see also CODE JUST. 3.5.1 (Valens & Gratian 376) (“*Ne quis in sua causa judicet vel sibi jus dicat.*”).

507. *City of London v. Wood* (1702) 88 Eng. Rep. 1592, 1602; 12 Mod. 669, 688; Philip A. Hamburger, *Revolution and Judicial Review: Chief Justice Holt’s Opinion in City of London v. Wood*, 94 COLUM. L. REV. 2091, 2091 (1994).

508. 3 U.S. (3 Dall.) 386 (1798).

509. *Id.* at 388.

510. *Id.*; see also *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810); *Tumey v. Ohio*, 273 U.S. 510, 524 (1927); *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009).

511. 506 U.S. 224 (1993).

the Senate's constitutional discretion to adopt its own procedures in the impeachment trial of a federal judge stemmed in part from the conflict of interest that would arise if the federal courts could review its proceedings.⁵¹²

One may argue that the Vice President cannot be fairly (or constitutionally)⁵¹³ charged with the exclusive authority over electoral votes.⁵¹⁴ Vice Presidents from John Adams to Al Gore have presided over vote counts at joint sessions after presidential elections in which they were candidates.⁵¹⁵ According to the counterview, if the Vice President were the final decisionmaker on the validity of contested electoral votes, (s)he would be positioned to control an election's outcome. The ECA seeks to allay this danger: its procedural provisions "drain away as much power as possible from the Senate president, whom the [Constitution] appoints to preside at the joint session when Congress [sic] counts the votes."⁵¹⁶

Plausible as this argument may seem, it does not survive closer inspection. As Adrian Vermeule writes:

[T]he *nemo iudex* principle is an exaggerated and misleading half-truth. Sometimes rulemakers in public law do and should design institutions with a view to the *nemo iudex* principle. In other cases, however, they do not and should not. In many settings,

512. *See id.* at 234–35 (“[J]udicial review would be inconsistent with the Framers’ insistence that our system be one of checks and balances. In our constitutional system, impeachment was designed to be the *only* check on the Judicial Branch by the Legislature.”).

513. Seligman ventures that any theory that permits such a conflict of interest to arise in an electoral count dispute is “a dangerous view that undercuts the basic principles of American democracy”—so much so, he says, that perhaps “even engaging in rigorous legal argument with [it] legitimizes a view that should simply be shunned.” Seligman, *supra* note 134, abstract; *see also id.* at 12 (stating that the theory is “morally dangerous”); *id.* at 4, 31 (“Everyone, from the greatest statesman to the youngest child, recognizes the sheer absurdity of a single person deciding whether they themselves [sic] won an election.”). Seligman supports these contentions by reference to the anti-monarchism of the Founders. James H. Hutson, *John Adams’ Title Campaign*, 41 *NEW ENG. Q.* 30, 34 (noting John Adams’s view that the Constitution “had endowed the Presidency with ‘regal authorities’”).

514. *See Kesavan, supra* note 26, at 1700; Foley, *supra* note 24, at 322 (noting the “apparent conflict of interest caused by Mike Pence simultaneously being a candidate for reelection and arbiter of the electoral dispute”).

515. In addition, Vice Presidents Martin Van Buren, John C. Breckinridge, Richard Nixon and George H.W. Bush have been in that position. *See Harrison, supra* note 26, at 703 n.12.

516. Siegel, *supra* note 139, at 634–35.

public law makes officials or institutions the judges of their own prerogatives, power, or legal authority.⁵¹⁷

Whether by design or inadvertence, the Constitution occasionally places final authority in persons or bodies that are likely to be interested or biased in the outcome. For example, the Constitution permits the Vice President to preside at his or her own impeachment trial before the Senate.⁵¹⁸ And it would seem that, if the Senate tries to decide the outcome of an election under the Twelfth Amendment but gets deadlocked, then the incumbent Vice President, even if a candidate for reelection, could break the tie and vote for him- or herself.⁵¹⁹

Other examples involve all three branches of the federal government. Nothing in the Constitution prohibits a President from pardoning himself, “except in [a] Case[] of Impeachment.”⁵²⁰ Nor does it forbid a President from vetoing legislation that would be adverse to his financial interests if enacted.⁵²¹ The Expulsion Clause authorizes each congressional house to expel a member with the concurrence of two-thirds of that house, but nothing in the text precludes the member

517. Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384, 387 (2012).

518. See Kesavan, *supra* note 26, at 1698 n.205 (citing U.S. CONST. art. I, § 3, cl. 6).

519. U.S. CONST. art. I, § 3, cl. 4 (providing that the Vice President as President of the Senate “shall have no Vote, unless they [the Senate] be equally divided”).

520. U.S. CONST. art. II, § 2, cl. 1. In 1974, the Office of Legal Counsel of the U.S. Department of Justice issued a brief and conclusory opinion stating that “[u]nder the fundamental rule that no one may be a judge in his own case, it would seem that the question [whether the President can pardon himself] should be answered in the negative.” MARY C. LAWTON, OFFICE OF LEGAL COUNSEL, PRESIDENTIAL OR LEGISLATIVE PARDON OF THE PRESIDENT (1974), https://www.justice.gov/sites/default/files/olc/opinions/1974/08/31/op-olc-supp-v001-p0370_0.pdf [<https://perma.cc/N74H-JVQ9>]. However, that position assumes that the “fundamental principle” in question is a constitutional rule—and the text of the Constitution, including the carefully crafted exceptions to the scope of the President’s pardon power, do not support that contention. See Alberto R. Gonzales, *Presidential Powers, Immunities, and Pardons*, 96 WASH. U. L. REV. 905, 934–35 (2019). Moreover, two days before the Philadelphia Convention approved the Constitution, a motion to narrow the Pardon Power because “[t]he President himself may be guilty” was rejected, despite James Madison’s support. James Wilson argued that if the President “be himself a party to the guilt, he can be impeached.” Michael W. McConnell, *Trump’s Not Wrong About Pardoning Himself*, WASH. POST (June 9, 2018, 6:28 PM), https://www.washingtonpost.com/opinions/trumps-not-wrong-about-pardoning-himself/2018/06/08/e6b346fa-6a6b-11e8-9e38-24e693b38637_story.html [<https://perma.cc/Q2S4-MK44>].

521. U.S. CONST. art. I, § 7, cl. 2.

facing expulsion from voting against the measure.⁵²² The Constitution (or current Senate Rules) does not preclude a senator from voting for him- or herself to be the president pro tempore.⁵²³ Whether sitting congressmen may serve in the U.S. Armed Forces Reserves, despite the Incompatibility Clause, has been left to Congress to decide.⁵²⁴ Congress can set members' salaries and benefits⁵²⁵ and can exempt itself from generally applicable laws.⁵²⁶ Finally, federal courts have adjudicated constitutional questions in cases where the Justices and judges themselves have personal interests in the outcome, such as ones determining whether the imposition of a federal income or inflation tax violates the constitutional mandate of nonreducible federal judicial compensation.⁵²⁷ And judges are immune from civil liability for constitutional torts.⁵²⁸

Further, if the Vice President were constitutionally barred from counting and ruling on electoral votes, that function may fall to whoever was performing the task instead. That might well be a senator who presided over the joint session as president pro tempore of the Senate and was a presidential candidate.⁵²⁹ If the Speaker of the House

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522. U.S. CONST. art. I, § 5, cl. 2. *See generally* CYNTHIA BROWN & TODD GARVEY, CONG. RSCH. SERV., R45078, EXPULSION OF A MEMBER OF CONGRESS: LEGAL AUTHORITY AND HISTORICAL PRACTICE (2018).
523. U.S. CONST. art. I, § 3, cl. 5; S. Res. 285, 113th Cong. (2013).
524. U.S. CONST. art. I, § 6, cl. 2; *see* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 209, 213 (1974); CYNTHIA BROUGH, CONG. RSCH. SERV., R40634, SERVICE BY A MEMBER OF CONGRESS IN THE U.S. ARMED FORCES RESERVES 1 (2009).
525. U.S. CONST. art. I, § 6, cl. 1; KLARMAN, *supra* note 101, at 176–78, 208.
526. *See* H. COMM. ON RULES, APPLICATION OF LAWS TO CONGRESS—LAWS THAT DO NOT APPLY TO CONGRESS (1993), <https://archives-democrats-rules.house.gov/Archives/jcoc2ai.htm> [<https://perma.cc/3T8G-LSD8>] (listing laws that do not apply to Congress, including the Occupational Health and Safety Act of 1970, Freedom of Information Act, and the Privacy Act).
527. *See* Evans v. Gore, 253 U.S. 245, 248–49 (1920), *overruled by* O'Malley v. Woodrough, 307 U.S. 277 (1939), *overruled by* U.S. v. Hatter, 532 U.S. 557 (2001); *see also* Atkins v. U.S., 556 F.2d 1028, 1036–38 (Ct. Cl. 1977), *disapproved of by* Consumer Energy Council of Am. v. Fed. Reg. Energy Comm'n, 673 F.2d 425 (D.C. Cir. 1982).
528. *See* Pierson v. Ray, 386 U.S. 547, 553–54 (1967) (state judges); Butz v. Economou, 438 U.S. 478, 498–500 (1978) (federal judges). *See generally* Peter H. Schuck, *The Civil Liability of Judges in the United States*, 37 AM. J. COMP. L. 655, 663–64 (1989).
529. It would appear, but does not seem settled, that the president pro tempore of the Senate would preside over the joint session in the absence of the Vice President. *See* CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., RL30960, THE PRESIDENT PRO TEMPORE OF THE SENATE: HISTORY AND AUTHORITY OF THE OFFICE 5 (2015).

presided over the joint session, a conflict could arise if no President were qualified to hold office, because in those circumstances the Speaker potentially becomes the acting President.⁵³⁰ Thus, the “conflict of interest” problem is not resolved by concluding that the Vice President may not perform the counting function.

*B. Is the Counting Function Too Important to Be Left
to the Vice President Alone?*

Another possible objection is that the Twelfth Amendment’s framers did not consider electoral vote disputes seriously. If they had, the argument goes, they would not have concentrated the power to resolve such crucial questions in one person. Instead, they created only a ceremonial process and left the resolution of disputes for future generations, with the likely result that Congress or another collective body would establish a more consensual system.

Professor John Harrison is an exemplary proponent of this view. Harrison acknowledged that

[i]f the Twelfth Amendment is assumed to be a dispute resolution mechanism, a natural reading of it thus indicates that in one especially important context [i.e., deciding what electoral votes are valid and to be counted] the dispute is to be resolved by a single individual [i.e., the Vice President as President of the Senate]. Neither House nor Senate is given any authority over the President of the Senate when it comes to opening the certificates, and Congress by statute may no more control the exercise of this constitutionally granted authority than it may tell the President whom to pardon.”⁵³¹

Then, in describing the purpose of the constitutional provisions on the electoral vote count, Harrison observed:

If Congress is not a dispute resolver, one is left to wonder why the Constitution employs both houses and the Senate’s President in the count. Is it mere ceremony, unrepugnant pomp? I think it is a ceremony, but not a pointless one. . . . Congress is there to make a record, not to be a judge. The electoral count ceremony is not designed for situations in which votes are in dispute.⁵³²

530. U.S. CONST. amend. XXV, § 3.

531. Harrison, *supra* note 26, at 703.

532. *Id.* at 705. When and by whom, then, are questions of the validity of disputable certificates to be decided? Harrison’s answer, based on textual analysis, is that that decision is committed to the Vice President *even before the ballots are counted*. *Id.* at 702–03. “The certificates that the President of the Senate is to open, however, are those of electors, not those of non-electors. Hence in order to know which certificates to open,

In other words, the Twelfth Amendment designated Congress as a spectator or witness, not a solver.

So far, almost everything Harrison wrote accords with our view. But he continued:

It would be hard to imagine that one person had been given this power, even if we did not know that the President of the Senate would often be a candidate for President of the United States. We know that well, as did the authors of the Twelfth Amendment.

It would be much easier to believe that this important decision was vested in a collective body⁵³³

Granted, it is hard to accept that one person (especially one who may have a strong personal interest in the outcome) should decide the validity of electoral votes. As the Supreme Court noted in *Seila Law LLC v. CFPB*,⁵³⁴ “Aside from the sole exception of the Presidency, that structure scrupulously avoids concentrating power in the hands of any single individual.”⁵³⁵ If the Vice President could decide such an important issue, Vice President Gore could have ruled during the 2001 vote count that the Florida votes were invalid. And this would have been true despite the Supreme Court’s decision in *Bush v. Gore*.

We do not argue that the Vice President has the general constitutional authority to invalidate electoral votes. The Florida electoral votes that Gore accepted had been certified by state authorities, and no competing slate of electors had been presented.⁵³⁶ The Twelfth Amendment mandates that those certified electoral votes “shall be” counted.⁵³⁷ In other words, the Vice President has no authority to override the state. As Harrison concedes, the Twelfth Amendment’s framers and ratifiers knew that a sitting Vice President may count and validate electoral votes in his or her favor. They saw that happen in the elections of 1796 and 1800.⁵³⁸ Many were in the Sixth Congress that

the President of the Senate must know which of competing slates of electors were validly appointed.” *Id.*

533. *Id.* at 703.

534. 140 S. Ct. 2183 (2020).

535. *Id.* at 2202.

536. *See supra* note 500 and accompanying text.

537. U.S. CONST. amend. XII.

538. *See Kesavan, supra* note 26, at 1699–1700 (“Even if the Framers and Ratifiers of the original Constitution did not understand that the Vice President would be a candidate for President or Vice President in the next election, the Framers and Ratifiers of the Twelfth Amendment . . . understood the conflict-of-interest problem well, especially given the

debated the Grand Committee bill of 1800, which would have vested the authority to examine and determine the validity of electoral votes in a select committee.⁵³⁹ Still, those politicians chose to preserve the existing counting procedure. And that procedure left no space for congressional intervention while votes were being counted. Congress's powers were to become active only if the vote count failed to produce a majority. The decision as to which ones counted remained with the Vice President.

Moreover, the Vice President's discretion is cabined, as indicated by the fact that his or her authority may be subject to judicial review. Jack Beermann and Gary Lawson argue that "the Vice President's actions would be subject to challenge in federal court on the ground that his or her rejection of a certificate was illegal or not supported by the facts."⁵⁴⁰ For example, they argue, "if the Vice President determines that a certificate from a State had not actually been sent by the States' [sic] electors, the court would have the authority to review the facts to determine whether that was true," even if "[t]his determination might require an inquiry into state law."⁵⁴¹ And the Vice President also lacks the authority to reject electoral votes based on a dispute over the conduct of the election in the state that has been resolved on state law grounds: "The Vice President has no constitutional authority to impose standards of conduct on state-administered selection procedures for electors."⁵⁴²

C. The Relevance of the Electoral Count Act

The third objection is that our arguments presume that the ECA is unconstitutional. The ECA was adopted in the aftermath of the Hayes-Tilden election of 1876.⁵⁴³ The Act is notorious for its interpretative difficulties.⁵⁴⁴ Nonetheless, it has provided the procedural framework in which the Electoral College's votes are counted. Therefore, it arguably provides an "anchor" for the vote count. *Bush v.*

imbroglio of the electoral count of 1801 where Vice President and presidential candidate Thomas Jefferson not only presided over the electoral count but also assumed the counting function.").

539. *Id.* at 1669–73.

540. Beermann & Lawson, *supra* note 185, at 312.

541. *Id.*

542. *Id.*; see also *McPherson v. Blacker*, 146 U.S. 1, 35, 41–42 (1892) (holding that state legislatures have plenary power in the appointment of electors); *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (upholding state's ban on write-in voting as constitutional, because the state had important regulatory interests in the ban).

543. Colvin & Foley, *supra* note 342, at 1044.

544. See, e.g., FOLEY, *supra* note 21, at 157–59; Wroth, *supra* note 139, at 321, 338–40; Siegel, *supra* note 139, at 542–45; Foley, *supra* note 24, at 329–35.

Gore did not challenge the Act's constitutionality. On the contrary, the Supreme Court took its constitutionality for granted and used it to fashion a remedy.⁵⁴⁵ But the Act's constitutionality remains an open question.

As mentioned, constitutional objections to the Act are longstanding, repeatedly challenging the statute and its precursors. During those protracted debates, members of Congress contended that the legislature had no constitutional authority to decide electoral vote count disputes and that any congressional attempt to regulate them would impermissibly interfere with the Vice President's constitutional role.⁵⁴⁶

This reading of the Twelfth Amendment conflicts with the ECA, as the two prescribe different procedures. The interpretation envisages no congressional power to regulate an electoral vote count dispute. By contrast, the Act plainly assigns to Congress a crucial role in deciding the validity of electoral ballots, closely circumscribing the Vice President's authority. This difference means that our argument, if correct, implies that the Act's substantive parts violate separation of powers.

D. How Would the Supreme Court Likely Rule if It Intervened?

The final objection is that the Supreme Court would be unlikely to rule on the ECA's constitutionality in the midst of a disputed presidential election or, if it did, that it would rely on pragmatic considerations to uphold that statute, rather than giving originalist reasons to strike it down.

Understandably, both the Supreme Court and the lower courts may be reluctant to become involved in contentious political cases. Thus, federal courts have declined to address the ECA's constitutionality. In *Bush v. Gore*, the Supreme Court assumed the Act's constitutionality.⁵⁴⁷ More recently, a district court rejected a suit brought by Representative Louie Gohmert for lack of standing. Representative Gohmert, with the slate of Arizona Republican presidential electors, sought a declaration that Vice President Pence had the authority to unilaterally reject electoral vote certificates at the vote counting scheduled for January 6, 2021.⁵⁴⁸ Representing Vice President Pence, the Department of Justice argued that Representative Gohmert's complaint should have been addressed to the Senate and House, not to the Vice President. The court dismissed the case on the grounds that all plaintiffs lacked standing.⁵⁴⁹ The Fifth Circuit, in a brief per curiam

545. *See generally* *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

546. *See supra* Part II.D.

547. *Bush*, 531 U.S. at 110.

548. *Gohmert v. Pence*, 510 F. Supp. 3d 435, 437–38 (E.D. Tex. 2021), *aff'd per curiam*, 832 F. App'x 349 (5th Cir. 2021).

549. *Gohmert*, 510 F. Supp. 3d. at 437–38.

opinion, did the same.⁵⁵⁰ Thus, the constitutional question was not resolved.

There are reasons to think that the Supreme Court would decline to hear a constitutional challenge to the ECA amid a bitter electoral vote count contest. *Bush v. Gore* itself limited the question to the application of the Constitution and the Act within a single state,⁵⁵¹ yet the case's impact continues to reverberate.⁵⁵² Certainly, in Texas's challenge to the outcomes of the 2020 election in several other states, the Court was reluctant to disturb those results.⁵⁵³ Thus, if another challenge to the ECA's constitutionality were to arise again in January 2025, the Court might decide not to intervene once Congress takes the matter into its hands, perhaps in the hopes of creating a space for political bargaining and compromise.⁵⁵⁴ As Justice Breyer wrote in *Bush v. Gore*:

The decision by both the Constitution's Framers and the 1886 Congress to minimize the Court's role in resolving close federal Presidential elections is as wise as it is clear. However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people's will far more accurately than does an unelected Court.⁵⁵⁵

Doctrinally, the Court can circumvent the merits issue by finding that the ECA's constitutionality is a nonjusticiable "political question." Such a decision might declare that the Twelfth Amendment's indeterminate text is a form of constitutional "silence," one with no

550. Gohmert v. Pence, 832 F. App'x 349, 350 (5th Cir. 2021) (per curiam).

551. *Bush*, 531 U.S. at 100.

552. In 2013, retired Justice Sandra Day O'Connor seemed to say that it was a mistake for the Court to have decided *Bush v. Gore*. See Andrew Rosenthal, *O'Connor Regrets Bush v. Gore*, N.Y. TIMES: TAKING NOTE (Apr. 29, 2013, 2:36 PM), <https://takingnote.blogs.nytimes.com/2013/04/29/oconnor-regrets-bush-v-gore/> [<https://perma.cc/ERY6-4XJJ>].

553. *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (denying plaintiff states' motion for leave for lack of standing).

554. Cf. *Levinson & Young*, *supra* note 161, at 964–70. Thus, in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2505–08 (2019), the Court applied the political question doctrine in declining to adjudicate a partisan gerrymandering case because it determined that no judicially discoverable and manageable standards could be found. The Court specifically noted that other institutions, including both state legislatures and Congress, were actively seeking cures for partisan gerrymandering and were fully capable of finding solutions to the problem without judicial intervention. *Id.* at 2507–08.

555. *Bush v. Gore*, 531 U.S. 98, 155 (2000) (Breyer, J., dissenting) (per curiam).

articulable rule of law to discern and apply.⁵⁵⁶ Alternatively, a “prudential” application of the political question doctrine might consider that “judicial review would be delegitimizing, or that other institutions are better equipped to resolve the issue.”⁵⁵⁷ Indeed, even if a congressional compromise seems remote, the Court might still decline to decide the merits. As Chief Justice Roberts wrote in *Rucho v. Common Cause*,⁵⁵⁸ the argument that the Court must deal with the problem of partisan gerrymandering because only it can “is not the test of [the Court’s] authority under the Constitution.”⁵⁵⁹ (The *Rucho* Court also expressed unwillingness to venture “into one of the most intensely partisan aspects of American life.”)⁵⁶⁰ Thus, the prospect of the institutional damage that might ensue could deter judicial intervention in the realm of politics.⁵⁶¹

But the absence of a Supreme Court precedent on the ECA’s constitutionality need not create a constitutional impasse. Recall that the Vice President is a constitutional officer who is entitled to his or her independent view of his or her constitutional authority’s scope.⁵⁶² Indeed, the absence of a judicial resolution may underscore the Vice President’s rights and responsibilities to make such an independent

556. *Cf.* *Goldwater v. Carter*, 444 U.S. 996, 1002–04 (1979) (Rehnquist, J., concurring) (noting that the absence of a constitutional provision relating expressly to treaty termination triggered the application of the political question doctrine). In *Zivotofsky v. Clinton*, the Court may have narrowed the scope of the political question doctrine: “We have explained that a controversy ‘involves a political question . . . where there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.”’” 566 U.S. 189, 195 (2012) (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962))). If so, Justice Rehnquist’s approach in *Goldwater* may no longer be available. 444 U.S. at 1002–04 (Rehnquist, J., concurring).

557. Leading Case, *Article III—Justiciability—Political Question Doctrine—Rucho v. Common Cause*, 133 HARV. L. REV. 252, 257 (2019).

558. 139 S. Ct. 2484 (2019).

559. *Id.* at 2507.

560. *Id.*

561. See Richard L. Hasen, *The Supreme Court May No Longer Have the Legitimacy to Resolve a Disputed Election*, ATLANTIC (Feb. 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/supreme-court-elections/605899/> [<https://perma.cc/54JH-YG4G>]. Such worries might well be aggravated by current threats to “pack” the Court. *But see* Land & Schultz, *supra* note 26, at 379–83 (concluding that “if a constitutional crisis in the 2016 election occurred, only the federal courts would likely be detached and respected enough to be capable of resolving the crisis—short of an unlikely Congressional compromise”).

562. See *supra* Part II.

determination in light of an informed understanding of the Constitution.

But what if the Court does decide to review this thorny question? After all, “[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them,”⁵⁶³ and that obligation may well entangle them in political thickets. The Court has not shied away from its duty since *Bush v. Gore*, as it has decided or will decide politically polarizing questions over abortion,⁵⁶⁴ gun rights,⁵⁶⁵ immigration,⁵⁶⁶ transgender military bans,⁵⁶⁷ the census,⁵⁶⁸ and COVID mandates.⁵⁶⁹ The existence of a constitutional silence has not always barred justiciability.⁵⁷⁰ Avoidance of controversies may be impossible after all.

Because this question is predictive, the answer is uncertain. This is so largely because it is not clear how much weight the Court would give to the early constitutional practices we have described, including the ECA’s enactment and uses. Broadly speaking, the result would depend on whether the Justices would follow our originalist approach or a pragmatic one.

Congress has long assumed that it can constitutionally resolve disputed vote counts (or create a body with the delegated power to do so).⁵⁷¹ But that assumption does not in itself decide the question. Path dependence does not justify an unconstitutional usurpation of power by Congress.⁵⁷² While the judicial “liquidation” of constitutional issues by

563. *W.S. Kirkpatrick & Co. v. Env’t. Tectonics Corp.*, 493 U.S. 400, 409 (1990).

564. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

565. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).

566. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

567. *US Supreme Court Allows Trump Military Transgender Ban*, BBC (Jan. 22, 2019), <https://www.bbc.com/news/world-us-canada-46963426> [<https://perma.cc/MY6P-JUWU>].

568. *Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019).

569. *Biden v. Missouri*, No. 21A240 (U.S. Jan. 13, 2022); *Nat’l Fed’n of Indep. Bus. v. OSHA*, No. 21A244 (U.S. Jan. 13, 2022); *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021).

570. In *Seila Law v. CFPB*, the Court observed that “[i]t is true that there is no ‘removal clause’ in the Constitution, but neither is there a ‘separation of powers clause’ or a ‘federalism clause.’ These foundational doctrines are instead evident from the Constitution’s vesting of certain powers in certain bodies.” 140 S. Ct. 2183, 2205 (2020) (internal citations and quotations omitted).

571. U.S. ELECTORAL COMM’N, 44TH CONG., PROCEEDINGS OF THE COMMISSION (1877); *Electoral Count Act*, Pub. L. No. 44–37, 19 Stat. 227 (1877).

572. *See, e.g., INS v. Chadha*, 462 U.S. 919, 959 (1983) (holding legislative veto unconstitutional despite frequent enactment by Congress); *NLRB v. Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring).

reference to political practices often has epistemic and practical merits, it also poses theoretical and material problems.⁵⁷³ Indeed, several of the Court's recent cases demonstrate a contradiction between judicial pragmatism honoring longstanding political arrangements and originalism favoring early constitutional texts and practices. In *National Labor Relations Board v. Canning*,⁵⁷⁴ the Court interpreted the Recess Appointments Clause in light of longstanding presidential actions and the Senate's general acquiescence.⁵⁷⁵ William Baude writes,

The strongest arguments in the case boiled down to a clash between apparent longstanding practice and interpretive first principles such as original meaning and structure. The case therefore became a battleground for recurring methodological questions: When should the Court invalidate longstanding practices in the political branches? Can subsequent practice trump the original meaning of the text?⁵⁷⁶

It seems fair to say, then, that a pragmatic Supreme Court would give substantial weight to a congressional practice that has existed for over 132 years with distinguished exponents. But an originalist Court would do the opposite—and the Court seems to be increasingly originalist. Such a Court should rely more heavily on historical evidence in cases of first impression.

CONCLUSION: WHAT SHOULD PENCE HAVE SAID?

In a recent speech, former Vice President Pence defended his handling of the 2020 electoral vote count against criticisms by former President Trump:⁵⁷⁷

There are those in our party who believe that as the presiding officer over the joint session of Congress, I possessed unilateral authority to reject Electoral College votes. And I heard this week that President Trump said I had the right to “overturn the

573. See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 47–48 (2019).

574. 573 U.S. 513 (2014).

575. *Id.* at 514.

576. Baude, *supra* note 573, at 6 (internal citations omitted).

577. Mike Pence, Address at the Federalist Society Annual Florida Chapters Conference (Feb. 4, 2022) (transcript available at <https://www.c-span.org/video/?517647-2/vice-president-pence-remarks-federalist-society-conference> [<https://perma.cc/37MH-UCN5>]).

election.” President Trump is wrong. I had no right to overturn the election.⁵⁷⁸

Trump responded the next day that Pence’s argument meant that the Vice President was nothing “other than being an automatic conveyor belt for the Old Crow Mitch McConnell to get Biden elected President as quickly as possible.”⁵⁷⁹ Trump also stated that “[i]f there is fraud or large-scale irregularities, it would have been appropriate to send those votes back to the legislatures to figure it out.”⁵⁸⁰

Pence was on unassailable grounds when he said that he had “no right to overturn the election.” He was correct to accept the challenged electoral votes for Biden from Arizona and Pennsylvania.

But the real constitutional question is much more nuanced and complex than that seen by Pence or Trump. As prescribed by the Twelfth Amendment, the baseline rule in counting electoral votes is that the votes “shall . . . be counted” as certified by states.⁵⁸¹ The rule is also supported by Pinckney’s arguments, based on his recollections of the Philadelphia Convention, that “as the whole was entrusted to the State Legislatures, they must make provision for all questions arising on the occasion.”⁵⁸² Of course, this statement must be qualified for two reasons. First, as *Bush v. Gore* showed, the federal judiciary can review the constitutionality of a state’s appointments of electors. Second, state courts and legislatures can also properly take part. Still, when a state has definitively spoken by certifying an elector or slate of electors, the matter ends there.

Again, the Vice President has a substantive role in the vote count only if a state’s electoral votes are disputed, because the state process has not yielded a single, definitive result. The executive officer lacks the general authority to refuse to accept and count the certified votes. To that extent, Pence is right. Also, even when a dispute does or could arise, the Vice President may have no significant role in deciding that dispute.

With that baseline in mind, recall the four types of vote count disputes we identified in Part I. The first involves one or more electors alleged to be constitutionally ineligible or to have cast their votes in an

578. Brett Samuels, *Pence Breaks with Trump: ‘I Had No Right to Overturn the Election,’* THE HILL (Feb. 4, 2022, 3:42 PM), [https://thehill.com/homenews/administration/592878-pence-breaks-with-trump-i-had-no-right-to-overturn-the-election_\[https://perma.cc/AU3R-6KNJ\]](https://thehill.com/homenews/administration/592878-pence-breaks-with-trump-i-had-no-right-to-overturn-the-election_[https://perma.cc/AU3R-6KNJ]).

579. Statement by Donald J. Trump, 45th President of the United States (Feb. 5, 2022) (available at <https://www.politico.com/f/?id=0000017e-ca8b-d1c5-a7ff-dae36690000> [https://perma.cc/S2SL-STG7]).

580. *Id.*

581. U.S. CONST. amend. XII.

582. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 382 (Max Farrand ed. 1911).

unconstitutional way. An elector who was a congressperson or held a federal office of profit or trust would be ineligible to serve as an elector. One who voted for a dead person, for someone who was not a natural-born citizen, or on a wrong day would have voted in an impermissible way. If a state certified such an elector or vote, the Vice President has no authority to reject—such votes must be counted. The remedy lies in state or federal courts before the state finalizes its certification. Once the state certifies, no remedy exists at the joint session in which the certificates are opened and the votes counted. If the Vice President nonetheless rejects the votes, the decision may be subject to judicial review.

The second type is where a state's governmental branches certify rival electors or slates of electors. In other words, the state's voice is not in unison. It arose in the 1876 election when one element of the Oregon government certified one elector and another a rival elector.⁵⁸³ A similar situation confronted Vice President Nixon in 1961.⁵⁸⁴ Yet another scenario could have arisen in the 2000 election.⁵⁸⁵ The United States could have seen still another episode of this kind in 2020, if the Pennsylvania legislature had certified a slate of Trump electors and the executive Biden ones.

In such cases, the Vice President has the final say. The official may not reject all of the rival electors or slates, as the state is constitutionally entitled to have its electoral votes counted. But the Vice President can decide which elector or slate speaks for the state. Further, the Constitution assigns this discretion solely to the Vice President. Judicial review should uphold the determination.

The third kind consists of cases where a state executive or a judicial body alters the method for appointing electors that the legislature designated. Assuming that some competent body in the state government certified electoral votes and that the legislature has yet to submit another, the Vice President has no authority to reject those certified electors. The remedy lies in the judicial process before the state submits its electoral certificates to the federal government. Another possibility is in persuading the state legislature to certify a rival set of electors, thus rebranding the dispute to the previous second category. The 2020 election falls squarely in this third category. Therefore, Vice President Pence had no authority to resolve the dispute and was constitutionally required to accept the Arizona and Pennsylvania electors as certified. He was right to accept those electoral votes. His only error was in allowing Congress to challenge them in the first place.

The fourth and final category includes cases where the state, having chosen to appoint its electors by popular vote, cannot achieve a final

583. *See supra* note 96 and accompanying text.

584. *See supra* Part III.

585. *See supra* Part I.

and definitive tally in time. This can occur if the popular vote tally remains tied up in litigation as the deadline draws near. If the state cannot ascertain electors by that date, the state would forfeit the right to have its electoral votes counted, and there would be no dispute for the Vice President to resolve. If the state government wishes to avoid that outcome, it can by the deadline designate a slate of electors who are not popularly elected. If so, the question becomes whether the state legislature can make unilateral appointments or enact a statute signed by the governor (or that managed to overcome a veto). If only the state legislature or executive provides a certified set of electors, the Vice President must count those votes.

What should happen if the state legislature certifies one slate and the executive another? This situation falls into our second category, so at first blush, the Vice President would make the final decision. But this would likely pose another constitutional challenge. Article II, Section 1, provides for the appointment of electors in the manner that the “Legislature” shall direct.⁵⁸⁶ Two interpretations are possible. On one hand, the state legislature, having enacted an ordinary statute for the popular selection of electors, may resume at any time the unilateral power to appoint electors. On the other hand, the legislature must use the same lawmaking procedure involving the executive in rescinding the statute before it can resume its appointive power.

As discussed, that question has yet to be addressed. Hence, if the Vice President assumed the authority to decide such a case, (s)he would necessarily be interpreting an unclear constitutional text. The exact extent of the Vice President’s authority in this extraordinary scenario is unclear. But it is extremely likely that a federal court would review whatever decision the Vice President makes to determine who the ultimate decisionmaker is. Would that figure be the Vice President, Congress, or the judiciary? We believe that the Vice President is indeed the right answer, because the state has not spoken with one voice. In any case, if a Vice President finds him- or herself in such a situation, (s)he would have to provide a well-reasoned opinion justifying his or her decision and the underlying constitutional interpretation.

The analysis in this Article provides an early take on the constitutionality of the recent amendments to the ECA. In our view, the Act violates the Constitution by shifting the responsibility to resolve electoral disputes from states and the Vice President to Congress. ECA amendments enacted in 2022 that seek to eliminate the Vice President’s role violate the Twelfth Amendment. Other measures should bring the Act closer to the state-centered vision of presidential selection expressed here. If Congress would make clear that the federal government can reject electoral votes only where a state sends more than one slate, the amended ECA would limit the class of cognizable electoral disputes to ones that fall into the second of the four electoral

586. U.S. CONST. art. II, § 1, cl. 2.

disputes we identified. That type is the only one that the Vice President can resolve. In that respect, our conclusion and the new Act would differ only with respect to the decisionmaker, not the class of legitimate disputes. The amended Act would bolster federalism in presidential selection by restoring state autonomy over the selection of electors.

Although we disagree with the ECA's authors and implementers, Congress can still play an important role in upholding federal authority over presidential elections. Unlike its provisions on Congress and the judiciary, the Constitution minimizes federal involvement in the selection of the executive. The document steers a path between a legislative choice of the executive typical of parliamentary systems and a plebiscitary executive that could collapse into demagoguery. The Constitution relies on states to elect the President and to resolve most electoral legitimacy disputes. Only in cases where a state itself cannot decide with a unified voice should the federal government interfere. In those cases, the best reading of the constitutional text, structure, and history calls upon the Vice President to decide.